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IN THE

Supreme Court of the United States

OCTOBER TERM, 1909

No. 160

STANDARD OIL COMPANY OF KENTUCKY

Plaintiff in Error

VS.

THE STATE OF TENNESSEE

EX RELATIONE, ATTORNEY-GENERAL, ETC.

Defendant in Error

REPLY BRIEF

ON BEHALF OF THE STATE OF TENNESSEE

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May it Please Your Honors:

On March 16, 1907, the State of Tennessee, by and upon the relation of her Attorney-General, brought a bill in equity in the Chancery Court of Sumner County, Tennessee, against the plaintiff in error, Standard Oil Company of Kentucky, a foreign corporation, for the purpose of having it ousted, enjoined and prohibited from doing a local or domestic

business within said State upon the ground that plaintiff in error had violated the provisions of the *Tennessee Anti-Trust Act* (Acts of 1903, Chap. 140), which denounced (Section 1) as unlawful all arrangements, contracts, agreements, trusts or combinations between persons or corporations, made with a view to lessen, or which tended to lessen, full and free competition in sale of articles imported into said State, or of domestic growth within said State, or which tended to advance, reduce or control the price or cost to the producer or the consumer of any such product or article; and which provided (Section 2), that any corporation chartered under the laws of said State, violating the provisions of said Act, should forfeit its charter and franchise, and that every *foreign corporation* violating the provisions of said Act should be denied the right to do, and prohibited from doing business in said State; and making it the duty of the Attorney-General to enforce said provisions by due process of law.

The Act of 1903, to enforce the provisions of which the bill in this cause was brought, is set out in full in the opinion of the Supreme Court of Tennessee (Rec., pp. 503-504; 120 Tenn. 86-101-103), and for convenient reference is printed as Appendix "A" to this brief.

There was an original and an amended and supplemental bill, and upon the hearing the Chancellor

sustained the demurrer to the amended and supplemental bill, but granted the relief sought by and under the original bill and enjoined the defendant from doing a local or intrastate business in Tennessee (Rec., p. 361), from which decree the defendant prayed and was granted an appeal to the Supreme Court of Tennessee, where, after full argument and hearing, an opinion was handed down (Rec., pp. 499-540), directing an affirmance of the decree of the Chancellor, and thereupon a decree was duly entered (Rec., pp. 540-541), in accordance with the opinion of the Court, denying the right of the defendant to continue doing a local or intrastate business within the State of Tennessee, and perpetually enjoining it from carrying on such business in said State, but expressly providing in said decree that nothing therein should be construed to in any way affect or apply to the defendant's interstate commerce, or prohibit it from engaging in interstate commerce within said State.

Thereupon the defendant, Standard Oil Company, after its petition to rehear had been overruled, sued out a writ of error, and has brought the record of the Supreme Court of Tennessee into this Court to be reviewed.

On the 12th day of April, 1909, the State of Tennessee submitted a motion to dismiss the writ of error or affirm the decree of the Supreme Court of

Tennessee, and filed a brief and argument in support of said motion, which was duly replied to by plaintiff in error, and, as we understand the order of this Court, said motion has not been overruled, as stated in the brief recently filed on behalf of the plaintiff in error (p. 83), but its consideration was postponed until the case is reached for hearing.

Inasmuch as we cannot agree in all respects to the statement of the case made on behalf of plaintiff in error, and the deductions or inferences drawn therefrom by learned counsel, at the risk of repetition and further enlarging the record, we deem it helpful to a full understanding of the case and the questions raised on behalf of plaintiff in error to give—

A BRIEF HISTORY OF THIS LITIGATION.

On September 21, 1893, the Standard Oil Company, of Kentucky, by filing with the Secretary of State of Tennessee a copy (Rec., p. 5-9), of its charter, acquired permission to carry on its business in Tennessee, and became (Acts of 1891, Chapter 122, Sec. 4, Appendix No. B), "to all intents and purposes, a domestic corporation," with the right to sue and be sued in the Courts of said State, and "subject to the jurisdiction of the Courts of this State, just as though it were created under the laws of this State."

The principal office of the Standard Oil Company in Tennessee was at Nashville, in charge of an official called a "special agent," who had general charge of all its business in Middle Tennessee, East Tennessee and parts of adjoining States.

In 1899 the Standard Oil Company had as competitors serving the oil trade in Middle Tennessee the Miller Oil Company and the Cassetty Oil Company, both located at Nashville. The Miller Oil Company was an independent concern, having refineries of its own in Pennsylvania. The Cassetty Oil Company was also an independent concern, but, owning no refineries, secured its supplies of oil from independent dealers.

In 1899, after a season of fierce competition,

the Standard Oil Company either forced out of business the Miller Oil Company, or purchased its property and plant at Nashville, and having so disposed of the Miller Oil Company, and having crippled the Cassetty Oil Company, the Standard Oil Company on October 30, 1899, entered into a written agreement with the Cassetty Oil Company (Rec., pp. 30-32), under and by which the Cassetty Company became the creature of the Standard Oil Company, and continued to exist, in so far as the business of selling refined oil was concerned, merely to keep up a show of competition with the Standard Oil Company, when in fact, the Cassetty Company for a consideration of $500 per month, practically discontinued its business of selling refined or illuminating oils, and such oils of this character as it did sell were received by it from the Standard Oil Company, and sold at prices fixed by that Company. In this way the Standard Oil Company secured a practical monopoly of the business of selling oil in Middle Tennessee, and this monopoly was continued down to and beyond 1903, during the latter part of which year the acts and doings of the Standard Oil Company, now to be referred to, at Gallatin, in Sumner County, Tennessee, became the subject of investigation and prosecution under the Anti-Trust Act of 1903.

It is proper to note here that this commercial

warfare between the Standard Oil Company on the one hand and the Miller Oil Company and the Cassetty Oil Company on the other hand resulting so disastrously to the last named companies, and by which the Standard Oil Company secured an absolute monopoly of the business of selling refined or illuminating oil in Middle Tennessee, was unknown to the State authorities when the original bill in this cause was filed, but was discovered during the taking of proof under the original bill and brought before the Court by the amended or supplemental bill dismissed by the Chancellor, to which more particular reference will hereinafter be made.

Prior to 1903—the exact time not being shown in the proof—the Standard Oil Company established storage tanks and created a local agency at Gallatin, Tenn., from which it carried on the business of a local dealer in oils, supplying the trade in Sumner County and parts of other counties adjoining, without any sort of competition. This business was under the management of one J. E. Comer, "Special Agent," whose headquarters were at Nashville—the local agent in charge at Gallatin was one O'Donnell Rutherford and one C. E. Holt, who was styled by himself and Comer a "salesman," had charge under the general supervision of said Comer of the local agent and agencies of the Standard Oil Company, inspecting them and giving directions and in-

structions to them—with authority to do whatever was necessary to advance the interests of the Standard Oil Company.

In October, 1903, the Standard Oil Company had stored in its storage tanks at Gallatin 15,363 gallons of Oil (Rec., pp. 213-530) of an inferior quality, which it was selling at 13 1-2 cents per gallon, delivered from its tank wagon. Thus matters stood when after the Standard Oil Company had been occupying this territory for years without competition, one Rosemon, a traveling salesman for the Evansville Oil Company, one of the few independent oil companies doing business in this country, had the temerity to invade the Gallatin territory, and offer for sale to certain retail dealers a superior grade of oil in competition with the oil of the Standard Oil Company, then stored in its tanks at Gallatin, and which was then being offered for sale at that place, and Rosemon succeeded in securing from certain customers of the Standard Oil Company orders for about 60 barrels of oil, at the price of 14½ cents per gallon, to be shipped from Oil City, Pa., and delivered in original packages to said persons about November 1, 1903. Among others, Rosemon secured an order from one S. W. Love for ten barrels of oil, another order from W. K. Lane for five barrels of oil, and still another order from J. E. Cron for ten barrels of oil, and another order from L. C. Hunter for six barrels of oil.

It is to be noted that while this superior grade of oil was sold to the merchants of Gallatin by the gallon, at 14½ cents per gallon, nevertheless, said merchants had the privilege of returning the barrels and receiving a credit of one dollar per barrel on their bills, so that the real cost of this oil to said merchants was only about 12½ cents per gallon.

These facts in relation to the invasion of the territory monopolized by the Standard Oil Company, becoming known to Special Agent Comer, at Nashville, he directed Holt to go to Gallatin "and hold his trade" and "look after the business, and countermand these orders." Pursuant to the instructions given him by Comer, his superior officer, Holt went to Gallatin, and failing to otherwise induce Lane, Love, Cron and Hunter to cancel the orders given by them to the Evansville Oil Company, Holt, with the help in some instances of the local agent, Rutherford, in order to prevent competition with the local business of the Standard Oil Company, entered into an arrangement with said parties by which, in consideration of their canceling the orders given by each of them to the Evansville Company, it was agreed that certain quantities of oil should be given to each of said persons so countermanding their orders, and such quantities of oil so agreed to be given were in fact furnished to said parties from the oil of

the Standard Oil Company stored in tanks at Gallatin. The result of these arrnagements between the Standard Oil Company and its agents and the merchants at Gallatin was that the Evansville Company was driven from that territory as a competitor, and soon thereafter the Standard Oil Company advanced the price of its inferior grade of oil, then being handled and sold for its local business at Gallatin, from 13½ to 14½ cents per gallon.

These facts becoming known, indictments were found by the grand jury of Sumner County against the Standard Oil Company, the said Holt and Rutherford, under the third section of the Anti-Trust Act of 1903, charging them with entering into said agreement with S. W. Love, and the others named above, for the purpose and with the view of lessening and destroying full and free competition in the sale of the Standard Oil Company's oil at Gallatin (Rec., 241-242). The defendants named in said indictments were arraigned thereunder, and on September 20, 1904, what was known as the "Love case" came on for trial upon the defendants' pleas of not guilty, whereupon Rutherford was acquitted by the jury, and the Standard Oil Company and Holt were found guilty, and the Standard Oil Company was adjudged to pay a fine of $5,000, and Holt was adjudged to pay a fine of $3,000. After motions for a new trial and in arrest of judgment had been overruled, the

defendants, Standard Oil Company and Holt, prayed and were granted an appeal to the Supreme Court of Tennessee, where the contention of the Standard Oil Company that a corporation was not subject to indictment under Section 3, of the Anti-Trust Act of 1903, but that the penalty provided by said Act against an offending corporation was by forfeiture of its charter, in case of a domestic corporation, or ouster from the State in case of a foreign corporation (Rec., pp. 244-246), was sustained and the judgment against the Standard Oil Company was reversed and the indictment against it was quashed (Rec., pp. 246-248), "without prejudice to such other proceedings as may be instituted against said Standard Oil Company to enforce the provisions of Chapter 140, of the Acts of 1903, and the particular provisions of Section 2, of said Act."

The judgment against Holt was in all things affirmed. The opinion of the Supreme Court of Tennessee, made a part of the record in this case (Rec., p. 246), is to be found officially reported under the name of "*Standard Oil Company et al. v. State,* 117 Tenn., 618."

In this case the Supreme Court of Tennessee held that the Anti-Trust Act of 1903 was valid and that it does not violate the commerce clause of the Constitution of the United States (Article 1, Section 8), because said Act was not intended to apply to

interstate commerce, but was a proper and valid regulation of intrastate business or commerce.

The judgment of the Supreme Court of Tennessee in the criminal case, (117 Tenn., p. 618) was entered (Rec., 247-8) on March 16, 1907, and thereupon on the same day, the State of Tennessee, through her Attorney-General, instituted the present proceedings by bill in the Chancery Court at Gallatin, in Sumner County, Tennessee, for the purpose, as aforesaid, of ousting the Standard Oil Company from Tennessee, and prohibiting and enjoining it from doing business in said State, under the provisions of Section 2, of the Anti-Trust Act of 1903.

THE ORIGINAL BILL.

The decree of the Chancellor (Rec., pp. 360-361) affirmed by the Supreme Court of Tennessee (Rec., pp. 540-541) was predicated upon the original bill which, omitting the caption, is as follows:

"Complainants respectfully show unto Your Honor:

I.

"That the defendant, Standard Oil Company, is a corporation chartered and organized under the laws of the State of Kentucky, and since 1893 has been claiming the right to do, and has been doing business in the State of Tennessee, after having filed a copy of its charter in the office of the Secretary of State of complainant, State of Tennessee, on September 21, 1893; a duly certified copy thereof is herewith filed as Exhibit A to this bill, but need not be copied in issuing process. Said defendant was, at the time of the matters hereinafter shown, and still is, doing business in Sumner County, Tenn., and has a local agent residing at, in or near the town of Gallatin, in said Sumner County.

II.

"Complainant further shows and avers that in 1903 the defendants, Standard Oil Company (for convenience hereinafter referred to as defendant company,) **was engaged in and*

*Italics herein, unless otherwise shown, are ours.

carrying on the business in Sumner County, and in Tennessee generally, of a dealer in coal oil and other productions of petroleum, which were and are commonly used for illuminating and other purposes, *which it sold both to retail dealers and the public generally.* The business of defendant company in the greater part of Tennessee, including Sumner County, was under the management and control of one J. E. Comer, whose headquarters or offices were at Nashville, in Davidson County, Tenn., and the local agent having in charge the business of said company at or near Gallatin, Tenn., was one O'Donell Rutherford, and there was also employed in and about the business of defendant company one C. E. Holt, who was styled a salesman, but who had charge, under the general supervision of said Comer, of the local agents and agencies of said company, inspecting the same and giving directions and instructions thereto. The said Comer, as special or managing agent, and the said Holt, acting under him, were authorized by defendant company to do, and, in fact, did, whatever, in their judgment, was necessary to advance the interests of their employer.

"Complainant further shows that the oil for illuminating and other purposes handled, sold and dealt in within the State of Tennessee was imported and brought into said State from other States, and then stored in large iron tanks located at places where defendant company established local agencies, and from said tanks, usually called storage tanks, said oils were

offered for sale and sold to retail dealers, and oftentimes to the public generally. *Defendant company had one of its storage tanks located at Gallatin, and from this tank it supplied the demand for oil in Gallatin and at other places in Sumner County.*

"Complainant further shows and avers that prior to October, 1903, defendant company had succeeded in preempting and securing for itself the oil business in Sumner County, and had succeeded in preventing other dealers in coming in competition with its said business in Sumner County, and at said time, to-wit: in October, 1903, was engaged in selling in Sumner County an inferior grade of oil at the price of 13½ cents per gallon.

"Complainant further shows that thus matters stood in relation to the oil business carried on by defendant company at Gallatin, when, on or about October 5, 1903, one Claude Rosemon, an agent or traveling salesman of the Evansville Oil Company, whose chief office was at Evansville, in the State of Indiana, and which was engaged in the business of selling among other things, illuminating oils, went to Gallatin, in Sumner County, Tenn., and *offered for sale to certain retail dealers at that place a superior grade of oil in competition with the oil of defendant company then stored in its tanks at Gallatin,* or which was being offered for sale at that place, and the said Rosemon succeeded in securing from certain customers of defendant company

orders for about sixty barrels of oil at the price of 14½ cents per gallon, to be shipped from Oil City, Pa., and delivered in original packages to said persons giving said orders about November 1, 1903. Among others, said Rosemon secured an order from one S. W. Love for ten barrels of oil; from one W. H. Lane an order for five barrels of oil; from one J. E. Cron an order for ten barrels of oil, and from one L. C. Hunter an order for six barrels of oil.

"Thereupon information having come to defendant company that said Evansville Oil Company had secured orders from and sold oil to its customers at Gallatin, as hereinafter shown, and was thereby and in that manner competing with the oil business of defendant company at Gallatin, *the said defendant company and its said agents,* J. E. Comer, C. E. Holt, and O'Donnell Rutherford, *and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter,* and perhaps others unknown to complainant, *unlawfully made and entered into an arrangement, agreement and combination, with a view to lessen, and which tended to lessen, full and free competition in the sale of defendant company's oil then being sold or offered for sale at Gallatin,* and the said defendant company and its said agents, Comer, Holt and Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron, and L. C. Hunter, and perhaps others unknown to complainant, entered into and *made certain unlawful arrangements, agreements or combinations which were designed to advance, and*

which tended to advance, the price or cost to the purchaser or consumer of defendant company's said oil then being sold or offered for sale at Gallatin, as aforesaid.

"And complainant further shows unto Your Honor that, in order to carry said unlawful arrangements, agreements or combinations into effect, and as a part of such unlawful agreements, arrangements or combinations, the said defendant company and its said agent, C. E. Holt, induced the said S. W. Love, W. H. Lane J. E. Cron and L. C. Hunter, to rescind and cancel their several purchases of oil or orders for oil from said Evansville Oil Company, and as a consideration or inducement for said rescissions or cancellations, and as a part of said unlawful arrangements, agreements or combinations, said defendant company gave without cost or charge to the said S. W. Love one hundred gallons of oil, and to said Lane 50 gallons of oil, to said Cron one hundred gallons of oil, and to said Hunter fifty gallons of oil, and at its own expense, sent telegrams in the name of said Love, Lane, Cron and Hunter, to said Evansville Oil Company, cancelling the orders of said parties.

"Complainant further shows unto Your Honor that the said Love and others named above not only rescinded and cancelled, in the manner and as above shown, their several orders given the Evansville Oil Company as aforesaid, but that they refused to accept or receive said oil

when the same was shipped to Gallatin. So that the said Evansville Oil Company was driven from the field as a competitor with defendant company in the oil business at Gallatin, *and thereupon defendant company, having succeeded by means of and through the aforesaid unlawful agreements, arrangements and conbinations, in not only lessening, but destroying, full and free competition in the sale of its oil then stored at Gallatin, and being offered for sale there, immediately advanced the price of its oil, which was of inferior grade, as hereinbefore shown, from* 13½ *cents per gallon to* 14½ *cents per gallon,* the price at which the said Evansville Oil Company had offered for sale and had sold a grade of oil far superior, as complainant is informed and believes, to the oil sold by defendant company.

"So that complainant avers and charges that the unlawful arrangements, agreements and combinations made and entered into between the defendant company and its said agents, Comer, Holt and Rutherford, and the said Love, Lane, Cron and Hunter, as hereinbefore shown, were not only made with a view of lessening full and free competition in the sale of defendant's oil at Gallatin, but that, in fact, said unlawful arrangements, agreements or combinations naturally tended to and did result in lessening and destroying full and free competition in defendant company's said oil at Gallatin, and naturally tended to and did result in advancing the price or cost of said oil to defendant's customers and

the consumers of said oil in and about Gallatin, and in Sumner County, Tenn.

"Therefore, complainant charges that defendant company, a foreign corporation as aforesaid, has, in the manner hereinbefore set out, violated the provisions of Section 1, of Chapter 140, of the Acts of the General Assembly of 1903, and this bill is brought by the complainant, through her Attorney-General, as aforesaid, in order that the punishment for such violations prescribed by Section 2 of said Act may be imposed upon said defendant company, to-wit: that said defendant company be denied the right to do, and be prohibited from doing, business in this State.

Record, pp. 1-4-500-502.

Thereon, complainant, State of Tennessee, among other things, prayed:

For a decree enforcing the provisions of Chapter 140, of the Acts of 1903, and particularly Section 2 of said Act, against said defendant company, to the end that it be denied the right to do, and be prohibited and ousted from doing, business within this State, and to the end that such decree may be made effectual, its permit or license to do business in this State be cancelled; that the said defendant company, its officers, agents, employees and all persons acting for it, may be perpetually enjoined from doing or carrying on its business in this State.

Record, pp. 4-503.

DEFENSES TO THE ORIGINAL BILL.

The Standard Oil Company interposed a demurrer (Rec., p. 10) to the original bill, challenging its sufficiency upon the ground that the terms or the provisions of the illegal agreements, arrangements or combinations, alleged to have been entered into were not set out with sufficient particularity in the bill, but this demurrer was overruled (Rec., p. 359), and thereupon the defendant duly answered (Rec., pp. 11-23) said bill in substance, as follows:

It admitted that it was a Kentucky corporation and that, by filing a copy of its charter with the Secretary of State, it had acquired the right to do business in Tennessee, and that it had established a local business at Gallatin, in Summer County, Tennessee, under the control of the principal office at Nashville, in charge of its special agent, J. E. Comer. It admitted, in a general way, the averments in relation to the orders secured by Rosemon, representing the Evansville Oil Company, and that Comer directed Holt to go to Gallatin and look into the matter and that Holt secured the countermand of the orders given by Love, and others, to Rosemon by giving to said Love and others certain gallons of oil, as charged in the bill, but it denied that these transactions, executed by Holt, was authorized by the company, and contended that said oil was given away by Rutherford and Holt, upon their own responsibility.

It denied that it had been guilty of any unlawful agreement within the meaning of the Tennessee Anti-Trust Act of 1903, and averred that if these acts and doings at Gallatin were unlawful, they did not violate any law of the State of Tennessee (Rec., 17-22), but that "the acts really done by it . . . are transactions affecting and relating to interstate commerce, exclusively and wholly beyond the power or authority of the State of Tennessee to regulate, or punish, or control, and the said Act, Chapter 140, of the Acts of 1903, in so far as it assumes to do so, is void, for it is in violation of the Constitution of the United States." (Rec., pp. 17-22.)

It averred that it was a "person" within the meaning of the laws of the State of Tennessee, and particularly the Acts of 1903, Chapter 140, Section 3, and that it could be only proceeded against by indictment, and that the offense of which it had been guilty, if any, was a misdemeanor, and, therefore, it pleaded the statute of limitations of one year, prescribed by the laws of the State of Tennessee, against a prosecution for a misdemeanor.

It further averred (Rec., p. 20) that the offense charged against it in the bill is a criminal offense, and that it could only be put to answer or proceeded against by indictment or presentment, and could only be tried before a jury in a court of law and that only

after such a prosecution by indictment or presentment and a verdict of guilty thereunder would the State be entitled to proceed against it by a bill of equity, under Section 2 of the Anti-Trust Act of 1903.

It denied that the Anti-Trust Act of 1903 authorized the proceeding by bill in this cause and averred that if said Act does authorize this proceeding respondent was deprived of its liberty and property without due process of law and denied the equal protection of the law (Rec., p. 22).

Under the issues thus made proof was taken and the case having been heard, the Chancellor sustained the bill and granted the relief prayed therein (Rec., pp. 360-361), *and upon appeal the Supreme Court of the State found and held that the allegations of the original bill were sustained by the proof* (Rec., pp. 529, 537, 540), *and affirmed the decree of the Chancery Court* of Sumner County, among other things, as follows:

FINAL DECREE.

> Therefore, it appearing to the Court that the allegations of the original bill are sustained by the proof, and that the defendants Standard Oil Company, and its agents Comer, Holt and Rutherford and S. W. Love, W. H. Lane, J. C. Cron and L. C. Hunter, as alleged in said bill, unlawfully entered into an agreement and arrangement for the purpose and with the view

of lessening full and free competition in the sale of defendant's oil at Gallatin, and that such unlawful agreements and arrangements tended to and resulted in lessening and destroying full and free competition in the sale of defendant's oil at Gallatin, and tended to and resulted in advancing the price of said oil to defendant's customers at Gallatin; and it further appearing that the defendant Standard Oil Company, in entering into said unlawful arrangements and agreements violated the provisions of Section 1, of Chapter 140 of the Acts of 1903, and subjected itself to the penalty prescribed by Section 2 of said Act, applying to foreign corporations, it is accordingly so ordered, adjudged and decreed.

"And thereupon the Court doth further order, adjudge and decree that the defendant Standard Oil Company, a foreign corporation, chartered and organized under the laws of the State of Kentucky, be and hereby is denied the right to do and prohibited from doing business within this State, and its license or permit to do business within this State, issued on the 21st day of September, 1893, by the Secretary of State, be and hereby is canceled and annulled, and said defendant Standard Oil Company, its managers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from doing or carrying on business within this State; but nothing herein shall be construed to in any way effect or apply to defendant's interstate commerce, or to prohibit it from engaging in interstate commerce within the State." (Rec., pp. 540-541).

BRIEF AND ARGUMENT.

The numerous errors assigned by plaintiff in error on the record (pp. 543-545) seemed to be reduced in the brief (pp. 33-35) of learned counsel for plaintiff in error to the following contentions:

First,—That the Tennessee Anti-Trust Statute "as enforced and applied by the decree of the Supreme Court is void * * * * * as a regulation of interstate commerce."

Second,—That said statute is void "because it denies to the defendant that equal protection of the laws and deprives it of its property without due process of law."

Third,—That any proceedings against defendant on account of the matters complained of in the bill, are barred by the statute of limitations.

Before entering upon a discussion of these several propositions, we submit:

That the Tennessee Anti-Trust Act of 1903 has been sustained as a valid constitutional enactment, applicable only to domestic or intrastate commerce, by the Supreme Court of Tennessee, not only in the case at bar, by practically upon the same facts in the criminal prosecution against plaintiff in error

and its agent Holt, the opinion in which is reported in—

Standard Oil Co., et al. v. State, 117 Tenn. 618

That the State of Tennessee had the right to deal with the subject matters of said Act of 1903, and to denounce as unlawful agreements and arrangements in restraint of trade within the State, or which are designed or tend to prevent competition in the sale of commodities or products within the State, and to prohibit and punish such unlawful agreements or contracts, is no longer open to question.

National Oil Co. v. Texas, 197 U. S. 115;
Smiley v. Kansas, 196 U. S. 447;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86-107.

That the proper construction to be given to the Act of 1903, and what is to be regarded as among its terms—that is, its meaning and application—presents no federal question, but is conclusively determined by the decision of the Supreme Court of Tennessee.

Phoenix Ins. Co. v. Gardner, 11 Wall. 204;
Morley v. Lake Shore, etc. Co., 146 U.S. 162;
New York v. Roberts, 171 U. S. 658-661;
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28-42-43;

Western Union Tel. Co. v. Gottleib, 190 U.S. 412-425;
Smiley v. Kansas, 196 U. S. 447-455.

That the decision by the State Court that the statute does not apply to interstate commerce, but only to domestic or intrastate commerce, is conclusive.

That this Court will not review the findings of fact made by the State Court, but accepts such findings upon matters of fact as conclusive.

Quimby v. Boyd, 128 U. S. 489;
Eagan v. Hart, 165 U. S. 188;
Dower v. Richards, 151 U. S. 658;
Thayer v. Spratt, 189 U. S. 346;
Western Union Tel. Co. v. Gottleib, 190 U.S. 412-422;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86-97.

That this Court, being the final arbiter of the meaning and application of the provisions of the Federal Constitution, while accepting as conclusive the findings of the State Court upon matters of fact, will determine for itself whether the transactions involved in such findings of fact constitute commerce between the States, and whether any given action of the State in relation thereto is prohibited by the Federal Constitution.

Or, to state this proposition somewhat differently, we submit that the finding of fact by the State Court is conclusive as to the existence of such facts, but it is conceded that this Court will determine for itself whether the transactions involved in the facts as found by the State Court are under the control of the State, or beyond its power, and solely within the power and authority of the Federal government.

Coming now to an examination of the propositions insisted upon by plaintiff in error, we submit:

I.

The application of the Act of 1903 to the acts and doings of plaintiff in error and others, designed solely to prevent and effectually preventing competition with its purely local business and sales of oil at Gallatin, was a valid exercise of the police power of the State, and not a regulation of Interstate Commerce.

That plaintiff in error in its business of selling oil at Gallatin, was solely a local dealer in oil imported into the State and at rest in its storage tanks, and that such business was in no sense commerce between the states, must be taken as established upon this record.

And we respctfully submit that it was entirely competent for the State to prohibit any arrangement

or device designed or which tended to lessen full and free competition in the sale of such oil, or which was intended to advance or control the price or cost of such oil to the consumer. And the bill charged, and the Court so found, that the sole purpose of the arrangements and agreements entered into between the plaintiff in error and its agents and the local merchants, Love, Lane, Cron and Hunter, was to protect the local business of plaintiff in error from competition--and that the said arrangements, though effected upon a paltry consideration, naturally tended to and did result in preventing competition in the sale of plaintiff's oil and an increase in the price thereof after competition had been effectually eliminated.

We confess that we are unable to appreciate the argument made by learned counsel for plaintiff in error and to follow his refinements in analyzing numerous decisions of this Court, but we respectfully submit that none of the cases cited in the brief of counsel, are similar either in respect of the facts involved or the principle to be applied to the case at bar, and each case must be determined on its own particular facts.

It may be conceded that the transactions between the Evansville Oil Company and the merchants at Gallatin constituted commerce between the States, nevertheless the federal government

was wholly without authority over the local business of plaintiff in error at Gallatin, and the fact that the invasion by the agent of the Evansville Company of the territory monopolized by plaintiff in error, and the orders secured by such agent from the customers of plaintiff in error furnished the incentive for the plaintiff in error to enter into the unlawful agreements by which it stifled competition in its local business and enabled it to absolutely control, free of competition, the price of its oil to the consumers, does not convert its intrastate business into interstate commerce or enable it to avoid the consequences of his act in relation to a business wholly under the police power of the State.

The idea which we desire to express is clearly and forcibly stated by this Court in its opinion in the case of *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211-247, as follows:

> "Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. *It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State,* by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the

former is subject alone to the jurisdiction of the State."

It is unnecessary for this Court to determine whether the cancellation of the orders given the agent of the Evansville Oil Company by the Gallatin merchants constituted an offense against the Federal Anti-Trust Act—though there may be grave doubt that thereby an offense against said statute was committed—but certain it is that the conspiracy resulting in the cancellation of said orders was entered into, primarily, not with a view of affecting any sort of commerce between the states, but solely to protect from competition the local business of the plaintiff in error, and we submit that it is immaterial whether the competition threatening such local business came from inside or outside the State.

With all due respect to learned counsel for plaintiff in error, we have no doubt but if the Standard Oil Company had been indicted in a Circuit Court of the United States for violation of the Federal Anti-Trust Act, on account of the matters set out in the bill in this case, that the defense would have been that the acts and doings of plaintiff in error and its confederates at Gallatin were designed to prevent competition in intrastate commerce, and not commerce between the States.

Again we are compelled to confess our inability

to clearly follow the argument of counsel for plaintiff in error.

On their brief (pp. 64-65), it is stated:

> "If it be conceded that the purpose of the Standard Oil Company in entering into the agreement, was to lessen competition in the sale of the oil which it then had stored at Gallatin, and that the fact that oil was about to be imported by the Evansville Oil Company for sale there, was the occasion and incentive for the conspiracy, and that the agreement was 'conceived and effected' to protect the oil then stored at Gallatin, we are still left in the dark as to the nature of the agreement itself. All the facts above stated may tend to show that the character of the agreement was bad, that it was meant to hit and cripple trade, but they are not facts which enable us to certainly determine which trade—whether that offense is primarily against interstate commerce, or primarily against intrastate commerce. That question can be determined alone by a consideration of the nature and effect of the agreement itself—not of the mere motive, or purpose which the parties had in mind, when they made it."

We submit that each of the objections raised by learned counsel is met by the opinion of the Supreme Court of Tennessee.

There is nothing obscure or dark as to the "nature of the agreement."

The Court found that, for a paltry consideration, the Standard Oil Company and its agents induced several merchants—customers of the Standard Oil Company—at Gallatin, to revoke orders given to the Evansville Oil Company for oil in barrels. But it is argued by learned counsel for plaintiff in error that a merchant has a right to revoke an unexecuted order. But when men act in concert, and their several acts—though lawful if done alone and not as a part of a combination—form part of a common plan, all are unlawful.

Aiken v. Wisconsin, 195 U. S. 194-206;
Swift & Co. v. United States, 196 U. S. 396;
Standard Oil Co. v. State, **117 Tenn. 676-677.**

Further, learned counsel for plaintiff in error insists (p. 65) that the facts established, as hereinbefore set out, do not show "which trade" was intended to be affected by the conspiracy proven, and that it is not the motive or purpose of the conspiracy, but the nature and effect of the agreement itself which determines the question.

We submit that each of these objections is met by the findings of fact made by the Supreme Court of Tennessee to the effect that it was the local trade and intrastate business of the plaintiff in error which were intended to be affected and protected by the arrangements entered into between plaintiff in error

and its confederates, and that not only was the motive or purpose of the conspiracy to protect such intrastate business, but that such was the "effect of the agreement itself."

Record p. 538.

These same objections now urged by learned counsel for plaintiff in error were made in Holt's case (Standard Oil Co. v. State, 117 Tenn. 618), determined by the Supreme Court of Tennessee upon practically the same facts, and in that case the Supreme Court of Tennessee, speaking through Mr. Justice Shields, among other things, said:

> "The plaintiffs in error (Standard Oil Company and Holt) assail the constitutionality of the statute on which the indictment against them is predicated. Their contention is that it applies to contracts, agreements, arrangements, trusts and combinations made in relation to the importation of articles of commerce, and therefore, to that extent, it violates that portion of Article 1, Section 8, of the Constitution of the United States, which vests in Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, and is void.
>
> "It is not insisted that it applies solely to interstate commerce, but to that equally with commerce within the State, and that the arrangement which the plaintiffs in error are alleged

to have made was one relating to property to be thereafter imported into the State.

"We cannot agree to this insistence. The statute, when properly construed, does not apply to interstate commerce. The sole object and purpose of the enactment of it was to correct and prohibit abuses of trade within the State. This was the legislative intent, and will prevail over the literal meaning of words or terms found in the Act.

" 'The fundamental rule,' says Judge Cooper, speaking for this Court, in the case of *Brown v. Hamlet,* 8 Lea, p. 735, 'of construction of all instruments is that the intention shall prevail, and for this purpose the whole of the instrument will be looked to. The real intention will always prevail over the literal use of terms. Legislative acts fall within the rule, and it has been well said that a thing which is within the letter of a statute is not within the statute unless it be within the intention of the lawmakers.'

* * * * *

"We are also, in arriving at the intention of the Legislature enacting a statute, to consider the Acts of Congress upon the same kindred subjects, as we would those of our General Assembly. The Acts of Congress when within the scope of powers delegated by the States to the Federal Government, are the statute law and the higher statute law of the several States, and are enforced by their courts, in matters of which they have jurisdiction, as fully as their

own statutes, without being specially pleaded or proven.

"In the case of *Commonwealth v. Gayne,* it is said:

" 'Where two Governments like those of the United States and the Commonwealth exercise their authority within the same territory and over the same citizens, the Legislature of that which as to certain subjects is subordinate, should be construed with reference to the powers and authority of the superior government, and not be deemed as invading that unless such construction is absolutely demanded.' *Com. v. Gayne,* 153 Mass., p. 205.

"It is also a familiar canon of construction of statutes that they must be so construed, if it can be done without violence to the evident intent of the Legislature, so as to avoid any conflict with the Constitution of the State or of the United States; and that every intendment, when the statute has been formally enacted, must be made in favor of its validity, and that, where it is subject to two constructions, that must be given which will sustain it, rather than that which will defeat it.

"The Legislature was cognizant we must presume that it had no power to enact laws regulating interstate commerce, and did not intend to enact an unconstitutional law, in whole or in part. There was already then in force an Act of Congress, the Sherman Anti-Trust Act, enacted in 1890, fully covering that subject, the

provisions of which were much broader and more effective than those of this Act, and could be enforced to their fullest extent by the stronger and more vigorous government. There was neither the power nor the necessity for enacting any legislation relative to interstate commerce. The wrongs to trade which were intended to be corrected and punished were those being perpetrated against commerce within the State, which Congress could not reach, and for which there was then no efficient remedy. The only statute then in force in Tennessee relative to these abuses was one making it an ordinary misdemeanor for two or more persons to conspire to commit any act injurious to public morals, trade or commerce (Code, Shannon's Ed., Sec. 6693), and that there was a necessity for a more drastic one was a matter of common knowledge and generally recognized, and the enactment of this statute was an attempt to supply it.

"We give no force to the word 'importation' appearing in Section 1, because we think it was inaccurately used in referring to articles already imported; that is, that the phrase, 'importation or sale of articles imported into this State,' was intended to include and describe, among the articles of commerce to be protected, those which had been imported from other States and countries commingled with the common mass of property in this State, and no longer articles of interstate commerce. It is well settled that commerce in such imported articles may be regu-

lated by State legislation. *American Steel Wire Co. v. Speed,* 110 Tenn., p. 546. It is certain that merchandise of this character was intended to be included within the provisions of this Act, otherwise commerce, in the vast amount of valuable property of foreign production and manufacture that was then and is now in this State, would be wholly unprotected from the abuses legislated against. In no other way is such property mentioned, included, or referred to in the statute, and this phrase must be held to apply to it. A large part of the wealth of the people of the State is invested in imported property, and it cannot be presumed that the Legislature intended to discriminate against it. It needed the same protection as that of domestic growth or manufacture. The Legislature clearly intended to prohibit trusts, combinations and agreements affecting all commerce not covered by the Federal statute, and upon which it had a right to legislate. It did not intend to stop short of its power or to exceed it.

"The case of *Rector of Holy Trinity Church vs. United States, supra,* is much in point here. There it is said: 'It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not substitution of the will of the Judge for that of the legislator, for frequently

words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.'

"And again: 'The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and therefore, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute.'

"But if the act did prohibit the abuses legislated against in the importation of articles in this State, such provision does not vitiate the entire statute; it is constitutional and valid, so far as it affects commerce in articles which have been imported into the State and become commingled with the common mass of property of the State and subject to its laws, as articles of domestic production and manufacture.

"It is evident, from what we have already said, that the prevention of unlawful contracts in relation to the importation of articles was not the inducement of the enactment of this statute, but that the primary and chief purpose of the Legislature, beyond all question, was to protect commerce within the State. Its provisions upon this subject are to no extent and in no manner dependent upon one protecting the importation of merchandise from other States and countries. They are complete and capable of effective enforcement, without one in relation to interstate commerce. Such statutes, notwithstanding they contain clauses regulating interstate commerce, a matter not within the power of the States, have frequently been sustained and enforced by this Court and the Supreme Court of the United States, so far as they relate to commerce within the State. *State vs. Scott,* 98 Tenn., 254; *Austin vs. State,* 101 Tenn., 579; *Kidd vs. Pearson,* 128 U. S., 1; *Plumley vs. Massachusetts,* 155 U. S., 461.

"The plaintiffs in error (Standard Oil Company and Holt), are also mistaken in their conception of the charge made in the indictment, and of the object and effect of the evidence introduced to prove it. *The express averments of both counts of the indictment are that the defendants therein named conspired, contracted, and agreed with S. W. Love for the purpose and with a view to lessen and destroy full and free competition in the sale of a certain article of sale, coal oil, imported into this State; and the*

proof introduced by the State upon the trial was for the purpose of proving an agreement to lessen and destroy competition in the sale of coal oil which had, previous to the agreement, been imported into the State, and was then stored and upon sale at Gallatin. There is no averment that the agreement was made with a view to lessen, or intended to lessen and destroy, competition in the sale of coal oil to be imported by the Evansville Oil Company, and no proof was offered to that effect.

"*The charge upon which the plaintiffs in error* (Standard Oil Company and Holt) *were indicted, tried, and convicted, is the alleged making of an unlawful contract and agreement with S. W. Love to lessen and destroy competition in the sale of coal oil which the Standard Oil Company had imported into this State, and had, at the time of the agreement, stored in its storage tanks at Gallatin, and there offered for sale. The charge is that the agreement was made to protect oil already imported, and not oil to be imported. The evidence offered tended to prove an agreement conceived and effected by the Standard Oil Company, and its agents to protect the oil of the principal then stored in Gallatin, from competition with that about to be imported and offered for sale by a competitor, and not to protect that of the Evansville Oil Company yet to be transported there.*

"A combination affecting interstate commerce is none the less a violation of the Federal anti-trust statute and punishable under it, where the

agreement made incidentally affects intrastate commerce; and the same rule will apply to combinations made in violation of the statute of the State upon the same subject, where interstate commerce is incidentally affected. If it were otherwise, neither the Federal nor the State laws could be enforced in any case.

"The importation of oil to be made by the Evansville Oil Company was only the occasion, the incentive, of the conspiracy charged in relation to that theretofore imported by the Standard Oil Company.

"It is true the oil of the Standard Oil Company had been an article of interstate commerce, but it was not when the agreement with S. W. Love was made. It was then at rest in this State, and was subject to its revenue laws and the police power of the State. That it was subject to the revenue laws is conceded by the Standard Oil Company, and it had taken out a license and paid the revenue required and imposed by the laws of the State. That it was in its then condition subject to the police power of the State cannot be doubted. *Am. Steel & Wire Co. vs. Speed,* 110 Tenn., p. 546; *Brown vs. Houston,* 114 U. S., p. 622; *Pittsburg, etc., Co. vs. Bates,* 156 U. S., p. 577."

117 Tenn., pp. 641-648.

This holding was approved and reaffirmed by the Supreme Court of the State of Tennessee, in the case at bar (Rec., pp. 524, 527).

In addition to quoting and reaffirming the opinion in Holt's case, as set out above, the Supreme Court of Tennessee further said:

> "A tendency of the agreements and arrangements above refered to, and we think the inevitable purpose, under a fair deduction from the evidence, was to lessen competition with the defendant's business at Gallatin in respect of the oil it had on storage there, and was offering for sale. It is immaterial that it would have the like effect upon oil which might thereafter be imported into Gallatin by the defendant, and poured into its storage tanks at that place. It is likewise immaterial that nothing was said between Love, Lane, Cron and Hunter on the one side, and Holt and Rutherford on the other, as to the purpose of the several arrangements entered into, or the tendency thereof. It appears from the testimony clearly of Love, Lane and Cron that they well knew what the purpose was, and the inevitable tendency. That Holt knew it, goes without saying, since he went to Gallatin for the express purpose of endeavoring to suppress competition by shutting out the oil of the Evansville Oil Company. The inevitable tendency was to stifle competition as to the fifteen thousand gallons of oil then in storage tanks, as well as all the oil that might thereafter stand at rest in those tanks. Likewise it is true, in a broader sense that the purpose and tendency of these arrangements was to protect the defendant's local business at Gallatin." (Rec., p. 538.)

These findings are amply supported by the testimony, and while we understand the rule to be that your Honors will not go back of the findings to weigh the testimony and determine whether the findings are supported by the evidence, nevertheless we call the attention of your Honors not only to the testimony of the Gallatin merchants, referred to and set out in the opinion of the Court (Rec. pp. 531-533), showing a clear understanding, not only of the purpose, but the effect of the agreement, and that it was intended to, and did, protect and free from competition the local business of plaintiff in error at Gallatin, but also to the testimony of Holt, the active agent of plaintiff in error, in forming the conspiracy, showing not only his clear purpose in giving away oil to the Gallatin merchants, but the effect of these acts. Note his testimony:

"Q. *It did protect the oil you had stored there?*

"A. *Yes, sir.*

"Q. *And it was done for that purpose, wasn't it?*

"A. *Yes, sir.*"

Rec., p. 299.

And in another place he naively confesses that thereafter he was not troubled with Mr. Rosemon and the Evansville Oil Company.

Further, it is insisted by learned counsel for plaintiff in error (Brief, p. 159) that the managing

officials of plaintiff in error were ignorant of the arrangements at Gallatin entered into for its benefit.

We submit that this insistence is not only immaterial, but not supported by the facts. As has been shown, one Comer was the General Manager of plaintiff in error in Tennessee, and in Holt's case (117 Tenn. 671) the Supreme Court of Tennessee found as a fact that there was no doubt but that Comer authorized and directed Holt to proceed to Gallatin and to destroy the competition that was threatened to the local business of plaintiff in error from the orders secured by the agent of the Evansville Oil Company.

In this case the Supreme Court of Tennessee found as a fact that the managing officials of plaintiff in error did know what was being done in its interest and for its benefit.

Opinion, Rec., pp. 534-538.

The plaintiff in error retained Holt, its active agent in the conspiracy, in its employ for more than four years, and paid the fine assessed against him; and Holt himself testified, in substance, *that he felt all along that the company would protect him—"would help get me out of the trouble."*

Rec., pp. 295-309.

So, we insist, that the Supreme Court of Ten-

nessee found as a fact, and that such finding is amply supported by the evidence, not only that the conspiracy was entered into for the purpose of protecting the intrastate trade of plaintiff in error and that its inevitable effect was to protect such trade and to stifle competition against it, but that the managing officials of plaintiff in error were cognizant and approved of the things done.

The Court also found that within a month after it had succeeded in stifling competition with its local business at Gallatin, the plaintiff in error advanced the price of its inferior grade of oil from 13½ to 14½ cents—Rosemon says that the price at other places in the Middle Tennessee Territory went up two or three cents (Rec. pp. 105-112-113-114). In this way plaintiff in error more than compensated itself for the oil given away by its agents, and continued its mononoply, fixing prices at its will and without regard to distance by which the oil had to be transported before being placed upon a local market. Its fixing of the schedule of prices exhibited by it shows that such prices are not governed by cost and transportation, but are arbitrary in every respect.

Before leaving this phase of the question, in view of the reference by plaintiff in error to its transactions at Dover, in Stewart County, Tennessee, and its insistence (Brief, p. 158) that its busi-

ness at all times has been lawful, we deem it proper to show to your Honors that, whenever necessary to stifle competition, it uses petty and paltry methods, as at Gallatin and Dover, or, if occasion demands, it uses the python's coils to strangle competition—as at Nashville.

AT DOVER.

In the Fall of 1903, one Reynolds became the local agent of the plaintiff in error at Dover, in Stewart County, Tennessee, which was under and within the jurisdiction of the Louisville office, presided over by special agent Coons. The tank wagon under Reynold's charge traversed considerable territory, within which, a few miles from Dover, was a merchant by the name of Scarborough, who, it seems was not purchasing oil from plaintiff in error. This became known to one Carrico, who occupied the same relation to plaintiff in error as did Holt, and in January, 1904, Carrico called to the attention of Reynolds the fact that Scarborough was not purchasing oil from plaintiff in error, and said: "He (meaning Scarborough) is evidently selling another oil." (Rec., p. 136), and thereupon Carrico instructed Reynolds to secure some five gallon cans, fill them with oil and have his driver carry them along with the tank wagon and give them free of charge to Scarborough's customers, saying, "We will try and see if we cannot force him to take oil from the wagon." (Rec., p. 136).

It seems that Reynolds had noticed something in the papers about the Gallatin incident a few months before, and thereupon he conferred with his lawyer, who advised him to have nothing to do with

the matter, and, in consequence of this advice, he refused to carry into effect Carrico's instructions.

At this time, Reynolds, in addition to carrying on the local agency of plaintiff in error, was operating a livery stable, and Carrico was in the habit of securing horses and outfits from him, but after Reynolds's refusal to carry into effect the instructions above stated, Carrico ceased to have anything to do with Reynolds, and in a short time thereafter Reynolds was discharged.

Rec., pp. 137-138.

But it is said on behalf of plaintiff in error (Brief, pp. 158-159) that this "attempt" was not carried out, and that the evidence showed that the merchant Scarborough was actually purchasing oil in barrels at the time.

It is true that the attempt failed, but we submit that the statement that Scarborough was purchasing oil from plaintiff in error is not supported by the facts. Reynolds testifies that Scarborough was not purchasing oil from him, and that Carrico knew that he was not purchasing oil from their employer, and this was the occasion for the suggestion or instruction given Reynolds by Carrico which was not carried out.

It is true that Carrico denies the statement of

Reynolds, but on cross-examination Carrico admitted that after having had a talk with Reynolds he did go to see Scarborough, and he further admitted that he had been advised as to what Reynolds had testified in this case, and just before he, Carrico, was examined as a witness he went to see Scarborough and secured from him *papers, invoices* and *correspondence.*

Rec. pp. 349-350.

It is sufficient to note that these papers were not offered as evidence by plaintiff in error.

AT NASHVILLE.

The Contract with the Cassetty Oil Company.

The facts in relation to the method by which plaintiff in error strangled competition at Nashville, and thereby secure a monopoly of the entire oil business for Middle Tennessee, are in the record and throw a vivid light upon what plaintiff in error is pleased to term its "general policy."

Reference to these transactions is made in the third, fourth and fifth sub-divisions of the assignment of errors (Rec., p. 544) filed along with the petition of plaintiff in error for a writ of error, which assignment of errors was evidently prepared in anticipation of an adverse decision by the Supreme Court of Tennessee on the questions raised by the amended bill.

It is insisted by plaintiff in error (Brief, p. 84) that if this Court has acquired jurisdiction of this case—it being a case in equity—that the whole case will be opened up and reviewed.

We will state frankly to the Court that we are entirely willing to have the whole case opened and reviewed by this Court—if it be within the power, upon the record, of this Court so to do.

Further, we submit that opening up and reviewing the whole case this Court will see that the plain-

tiff in error has been in no sense prejudiced by the decree of the Supreme Court of Tennessee enjoining it from a continuance of its local business in said State, because even if it were possible to take the view of its acts and doings at Gallatin as now insisted upon by it, nevertheless a decree of ouster should have been rendered against it because of its methods in stifling competition at Nashville and its transactions with the Cassetty Oil Company, clearly in violation of the Tennessee Anti-Trust Act.

It is unnecessary for me to call to the attention of your Honors the familiar rule that a judgment or decree, sound and proper upon the record, will not be reversed even though based upon an erroneous reason, and if your Honors can open up this whole record it will be found, as stated above, that the decree of ouster would have been and is warranted by reason of the dealings between plaintiff in error and the Cassetty Oil Company, at Nashville.

The facts in relation to this matter are, briefly, as follows:

In 1899, in addition to plaintiff in error, there were in business in the Nashville Territory the Miller Oil Company, an independent concern, having its own refineries, and the Cassetty Oil Company, also an independent concern, but having no refinery of its own, but purchasing its oil from other dealers.

Some time during the year 1899, the plaintiff in error either forced out of business the Miller Oil Company or purchased its plant and property at Nashville. And, after a season of fierce competition, having crippled the Cassetty Oil Company, the plaintiff in error, on October 30, 1899, entered into a written contract with the Cassetty Company (Rec. pp. 30-32), under and by virtue of which the latter company became the creature of plaintiff in error, and continued to exist, in so far as the business of selling refined oil was concerned, merely to keep up a show of competition, when in fact the Cassetty Company, for a consideration of five hundred dollars per month, practically discontinued its business of selling refined or illuminating oils, and such oils of this character as it did sell were received by it from plaintiff in error and sold at prices fixed by plaintiff in error.

Said contract of October 30, 1899, continued for a period of five years—that is, down to October 30, 1904—and was lived up to and carried out by both of said parties during that time. In this way the plaintiff in error secured and continued its monopoly of the oil business in the Nashville territory. The existence of said contract and the doings thereunder by said companies were discovered (Rec., pp. 172-173-153-170) during the taking of proof under the original bill, and thereupon the State, by her Attor-

ney-General, filed an amended and supplemental bill Rec., pp. 23-34) predicated not only upon the acts and doings of the Standard Oil Company and its agents at Gallatin, but particularly upon the contract between it and said Cassetty Company, and the acts and doings of the parties thereunder. This contract, as above stated, was entered into on October 30, 1899, and continued in force until October 31, 1904 (Rec., p. 30), more than a year after the passage of the Anti-Trust Act of 1903. To said amended and supplemental bill the Standard Oil Company interposed a demurrer (Rec., p. 35) incorporated in its answer, and the second ground of the demurrer specially challenged said amended and supplemental bill, upon the ground, as claimed, that when said contract between the two companies was made and entered into there was no statute in Tennessee prohibiting a foreign corporation from entering into such a contract and agreement, or which imposed a penalty of expulsion for entering into such a contract, or doing business thereunder in Tennessee. This ground of demurrer was sustained and the amended and supplemental bill dismissed, and thereupon the State excepted to the action of the Chancellor and prayed an appeal to the Supreme Court of the State and assigned error thereon (Rec., pp. 445-447) to the effect that said demurrer should have been overruled, because said contract entered into on October 30, 1899, was a continuing contract,

and was carried out and observed and acted on by the Standard Oil Company and the Cassetty Oil Company down to October 31, 1904, so that the acts and doings of said companies thereunder, after the enactment of said Anti-Trust Statute of 1903, were prohibited and were illegal, just as if said contract had been entered into after the passage of said act.

To sustain this proposition the State cited (Rec., pp. 446-448), among others, the case of *United States vs. Trans-Missouri Freight Association,* 166 U. S. 290-342, recently approved by this Court. in the case of *Waters-Pierce Oil Co. vs. Texas,* 212 U. S. 86-108.

However, the Supreme Court in deciding this case pretermitted the question raised upon the amended and supplemental bill, and said:

> "In the view we take of this case we need not further advert to the supplemental bill, or the action of the Chancellor thereon."
>
> Rec., pp. 499-500.

The facts in relation to the transactions between plaintiff in error and the Cassetty Oil Company, and upon which the amended and supplemental bill was predicated—which amended bill was answered by plaintiff in error—are in the record without objection and show conclusively that it was not only the intention, but the effect of the contract between the plaintiff in error and the Cassetty Oil Company to

eliminate as a competitor with the business of plaintiff in error at Nashville its only remaining competitor after the Miller Oil Company had been either driven from the field or its plant and business purchased by defendant.

It will be seen that this contract was carefully concealed, and the examination of the testimony of Collings, Vice-President of plaintiff in error, shows that he was much moved when questioned in regard thereto, and that when he was asked to produce it, he claimed that the copy in the possession of plaintiff in error had long since been destroyed.

It is not improper to note here that the record shows that the officers and agents of plaintiff in error often times found it very convenient either to lose or destroy valuable papers and contracts.

Collings, when asked if his company did not make an agreement with the Cassetty Oil Company by which the plaintiff in error was permitted to fix the price of oil sold by the Cassetty Oil Company, and that the plaintiff in error paid therefor to the Cassetty Oil Company five hundred dollars per month, said:

> *"I did not consider it in that light. It was not any agreement by which we were to fix the price."*
>
> Rec., p. 328.

Now, according to the very terms of the contract (Rec., pp. 30-32), this answer of Mr. Collings was uncandid, if not absolutely untrue. The Cassetty Oil Company was to buy all of its stock of coal oil from plaintiff in error. It was to act for plaintiff in error, and for it alone. However, the real purpose of the agreement, as disclosed by McIlwaine, President of the Cassetty Company, and Cassetty, its founder, was to have the Cassetty Oil Company held out as an apparent competitor and independent dealer, while in fact it did no business in selling refined oil or what is commonly called coal oil; so that the market for this product was turned over exclusively to plaintiff in error.

Before this contract was entered into, the Cassetty Oil Company had been purchasing oil from independent companies; after it was entered into, if it sold any coal oil it was to receive it from plaintiff in error.

Cassetty, Rec., pp. 154-157-164-165-169-170-173;

McIlwaine, Rec., pp. 174-181.

But it is insisted by plaintiff in error in its brief in this Court that this contract was entered into in Cincinnati. It is probably true that it was signed in Cincinnati by the officials of plaintiff in error. Its execution was completed in Nashville when the officials of the Cassetty Oil Company signed it there.

However, without regard to the place where the contract was actually signed, there is no doubt but that its terms were carried into effect during the years of 1903 and 1904, after the enactment of the Anti-Trust Act of 1903, and the acts of the parties thereunder were not outside of the State, but were within Tennessee, and constituted purely a local or intrastate transaction and business.

At the termination of said contract, it was not renewed because plaintiff in error had nothing further to fear from the Cassetty Oil Compony. McIlwaine, a warm partisan of plaintiff in error, says that Cassetty upbraided him in regard to this, and said that they (meaning plaintiff in error) had thrown the hooks into them, and that "they had about squeezed the lemon and they had control of the marketing."

Rec., p. 186.

Therefore, if your Honors can open up and review the whole case made by the record, because, as insisted upon by plaintiff in error, this is a "case in equity," we submit that the decree of ouster against the plaintiff in error should have been predicated not only upon the original, but also upon the amended and supplemental bill.

It is insisted by plaintiff in error on its brief that the affirmance of the decree of the Chancellor

settles the questions made in the amended supplemental bill on the contract between plaintiff in error and the Cassetty Oil Company, but, we respectfully submit, that the formal affirmance of the decree of the Supreme Court of Tennessee (Rec., p. 540) must be read in connection with the opinion of the Supreme Court pretermitting—that is, reserving—the precise question upon which the Chancellor sustained the demurrer to the amended and supplemental bill, and when so read it appears that the questions made by the amended and supplemental bill were not determined against the State of Tennessee by the Supreme Court of that State.

The effect of the provisions of the Tennessee Code (1858), Sections 3931-3932, (Shannon's Code, Sections 5335-5336), is, as was held by the Supreme Court of Tennessee in the case of *Polk v. Pledge*, 5 Heisk. 373-373, to make the opinion of the Court a part of the record, and as such it will be read into and considered a part of the decree of the Court.

Therefore, we respectfully submit that there is nothing in the decree of the Supreme Court of Tennessee in formally affirming the decree of the Chancellor when said decree of the Supreme Court is construed in connection with the opinion of the Court as a part of said decree, which precludes your Honors from considering the violation of the Tennessee Anti-Trust Act by the plaintiff in error in respect of the matters set out in the amended and supplemenal bill.

II.

There is no merit in the claim that the Tennessee Anti-Trust Act of 1903 denies the plaintiff in error the equal protection of the law and deprives it of its property without due process of law.

In discussing this question throughout its brief, plaintiff in error stresses and reiterates the statement that the Tennessee Anti-Trust Act is a "general criminal law," and that these proceedings were instituted to "punish"—and to "enforce punishment" against—plaintiff in error, as a foreign corporation, for an alleged violation thereof; and charges that counsel for the State has sought to avoid the magic supposed to be contained in these terms, and to destroy the "complexion which the case has by reason of the setting given to it in the pleadings" by the use of "dainty terms" (Brief, pp. 1-28-85-88) in referring to the effect of a violation by a corporation of the inhibitions of the Tennessee Anti-Trust Act as "a statute liability."

We cheerfully confess our inability to appreciate the force of this argument, and content ourselves with expressing the hope that the strength of the State's case was in no way impaired by the use in our brief before the Supreme Court of Tennessee of the "dainty terms" objected to, which we made bold to adopt from the opinion of the United States Circuit Court of Appeals in the case of *Atlanta v.*

Chattanooga Foundry & Pipe Works, 127 Fed. Rep. 23-32, affirmed by this Court in 203 U. S. 390.

The bill in this suit was brought in one of the Chancery Courts of the State as a civil proceeding to enforce a civil remedy against a corporation, violating the provisions of Section 1 of the Tennessee Anti-Trust Act.

We may also be permitted to say that this suit was instituted in accordance with the decision of the Supreme Court in what is known as *Holt's* case, *supra,* wherein both Holt and the plaintiff in error herein had been convicted in the Circuit Court of Sumner County under the provisions of Section 3 of said Tennessee Anti-Trust Act, and wherein the Supreme Court of Tennessee sustained the defense set up by plaintiff in error that it could not be proceeded against, under the laws of Tennessee, by indictment, but that the only remedy against a corporation offending against the statutes designed to inhibit combinations in restraint of trade is a proceeding in the nature of a *quo warranto* under Section 2 of said Anti-Trust Act.

Perhaps we would not be warranted in insisting that plaintiff in error is estopped by that defense, but certainly it had great weight with the Supreme Court of Tennessee, and we could not state it better than to adopt the exact and forcible lan-

guage of its learned counsel, who, in defense of the State's insistence that a corporation offending against the laws of the State of Tennessee denouncing as unlawful conspiracies in restraint of trade, was subject to a criminal prosecution, among other things, said:

> "No fine can be imposed on a corporation for a violation of this act. Persons may be fined, but corporations cannot. They must be proceeded against by the Attorney-General of the State by *quo warranto* proceedings to forfeit franchises, and to oust from the State.
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> * * * * * * *
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> "No District-Attorney-General can proceed by indictment against a corporation, under this act. The Attorney-General of the State, if the case be one calling, in his judgment, for proceedings, may bring a bill in equity in the nature of a *quo warranto* proceeding, to oust the foreign corporation from doing business in Tennessee. That is what is to be done, and it is all that can be done. And, as already shown, even that cannot be done, if the corporation is engaged in interstate commerce business. That is to say, speaking precisely, the Standard Oil Company might be ousted from maintaining stations in Tennessee and selling oil therefrom, as it does now, but it could not be ousted from selling oil in original packages here, even by proceedings inaugurated by the Attorney-General of the State."
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> *Rec.*, pp. 244-245-246.

And at this place, in view of the repeated references to the provisions of the Tennessee Code (Shannon, Sections 6693-6694-6736), denouncing as a misdemeanor a conspiracy against trade, it is proper to call to the attention of your Honors that, in *Holt's* case, counsel for the State sought to meet the foregoing insistence on behalf of plaintiff in error, and to show that thereunder a corporation, as well as a natural person, was indictable for a conspiracy against trade (Rec., pp. 486-487), nevertheless the Supreme Court of Tennessee, in effect held that these provisions of the Code (Sections 6693-6694-6736) were repealed by the Anti-Trust Act of 1903.

Standard Oil Co. v. State, 117 Tenn., 642.

And now, before entering upon a discussion of the several reasons advanced by plaintiff in error to sustain its contention that the Act of 1903 denies it the equal protection of the law, and deprives it of its property without due process of law, it will be helpful to a clear understanding of the course of procedure in the Tennessee Courts to call to the attention of your Honors, briefly—

The Statutes of Tennessee in Relation to the Terms upon Which Foreign Corporations are Authorized to do Business in that State

The History of Anti-Trust Legislation in Tennessee

and

The Statutory Provisions Prescribing Methods of Procedure Against Corporations Committing Offenses Amounting to a Forfeiture of their Rights and Franchises.

Now,—

As to the Admission of Foreign Corporations.

The first statute (Acts of 1877, Chapter 31) requiring a foreign corporation to file a copy of its charter in the office of the Secretary of State as a condition precedent to its right to carry on business in said State was limited to mining or manufacturing companies; but in 1891 by Chapter 122 of the Acts of that year (Appendix No. B), the Act of 1877 was amended so as to include and apply to all foreign corporations that may desire to own property or do business in this State. This Act merely required a foreign corporation to file in the office of the Secretary of State a copy of its charter, and cause an abstract thereof to be recorded in the office of the Register of each county, in which it desired or proposed to carry on its business, and thereupon, without the issuance of any formal permit or license, it was entitled to carry on its business in Tennessee, and it became to all intents and purposes (Acts of

1891, chapter 122, sec. 4), a domestic corporation, with authority to sue and to be sued in the courts of said State, and *subject to the jurisdiction of the courts of said State, just as though it were created under the laws of said State.*

This Act of 1891 was the statute in force in Tennessee when, on September 21, 1893, the plaintiff in error filed a certified copy of its charter with the Secretary of State, the effect of which was, not to make a contract with plaintiff in error (Rec., p. 523), but to grant it a mere revocable license or permit and to make plaintiff in error subject to the jurisdiction of the courts of Tennessee, for violations of the general laws of the State in the same manner as though it were a Tennessee corporation.

Anti-Trust Legislation

By the Code of 1858, sections 4789, 4790, 4825, (Shannon's Code, sections 6693, 6694, 6736) a conspiracy against trade or commerce was made a misdemeanor.

But, as hereinbefore shown, the Supreme Court of Tennessee, in effect, held in *Holt's case* (117 Tenn. 642) that these Code provisions were repealed by subsequent legislation.

In 1889, by chapter 250 of the Acts of 1899, the Legislature of Tennessee passed an Act (Appendix No. C), making it unlawful for any person or persons or association of persons, or any corporation in this State, *or doing business in this State,* to enter into any agreement or arrangement, the effect of which was to destroy or limit competition, and by section 2 of said Act it was provided that any person or *corporation* violating the provisions of said Act should pay a fine of not less than $250.00 for the first offense, and for the second offense a fine of not less than $500.00, thereby including foreign as well as domestic corporations under the provisions of this section. By section 4 of said Act it was provided that *any corporation created or incorporated by or under the laws of this State, violating the provisions of said Act should forfeit its corporate rights and franchises,* and it was made the duty of the

Attorney-General of the State to institute proceedings for the forfeiture of such rights and franchises. *By this Act a foreign corporation offending against the statute was subject only to a fine, while a domestic corporation forfeited its corporate rights and franchises.*

In 1897, by chapter 94 of the Acts of 1897, the Legislature pased an Act declaring unlawful and void all agreements in restraint of trade, which was practically identical with the Anti-Trust Act of 1903, involved in this case, except that the fourth section of the Act of 1897 contained an exception in favor of agricultural products or live stock, similar to the Illinois statute disapproved by this Court in the case of *Union Sewer Pipe Co. v. Connolly,* 185 U. S., p. 554. By the Act of 1897 *foreign corporations offending against its provisions were placed upon the same footing with domestic corporations,* in that it was by section 2 of said Act; provided:

> "That any corporation holding a charter under the laws of this State, which shall violate any of the provisions of this Act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine. Every foreign corporation violating any of the provisions of this Act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney-General to enforce these provisions by

injunction or other proper proceedings in any county in which such foreign corporation does business, by due process of law."

The holding of this Court in *Union Sewer Pipe Co. v. Connolly, supra,* resulted in the re-enactment in 1903 of the Act of 1897, with the exception in favor of agricultural products eliminated.

The Remedy Against Offending Corporations

It seems to have been well settled that at common law the remedy against a corporation committing an offense amounting to a surrender of its charter, or a forfeiture of its right to do business, was by *quo warranto;* but the writ of *quo warranto* has never been in force in Tennessee (*State v. Turk,* M. and Y. 297, 293; Attorney-General v. Leaf, 9 Hump. 753; Rec., p. 517). But in 1845 (Acts of 1845-46, Ch. 55), the Legislature provided a special statutory remedy for proceeding against corporations usurping franchises or committing acts amounting to a surrender of their rights and privileges as corporations.

This Act of 1845 was subsequently codified and is found in Shannon's Code, embracing sections 5165 to 5187, inclusive. Without setting out in detail these Code provisions (found in the opinion of the Supreme Court of Tennessee, on page 518 of the Record), it is sufficient to say that they provide for a suit to be brought by bill in equity in either the Circuit or Chancery Court, to be conducted as other suits in equity, and, provided *for such issues of fact as may become necessary to trial by jury in the progress of the case to be made up under direction of the Court and submitted to a jury.*

Thus was provided a complete remedy, by bill in equity to be conducted according to the recognized practice in courts of equity, against corporations violating the law, which was sustained as "due process of law" by the Supreme Court of Tennessee in the case of *State ex rel. v. Schlitz Brewing Company,* 104 Tenn., p. 715, which was a suit instituted by bill in equity upon the relation of the Attorney-General to enforce the provisions of the Anti-Trust Act of 1897, against the Schlitz Brewing Company. In this case the Act of 1897 was sustained as valid and constitutional, but after this Court, in the case of *Union Sewer Pipe Co. v. Connolly, supra,* had declared the Illinois statute void on account of the exception contained therein in favor of agricultural products, the Legislature of Tennessee passed the Act of 1903, chapter 140, which is practically identical, as above stated, with the Act of 1897, save that the exception in favor of agricultural products, etc., was omitted.

In the Schlitz Brewing Co. case, *supra,* practically the same assault was made upon the Act of 1897, as was made in this case upon the Act of 1903, but it was therein held that the second section of the Act of 1897—similar in all respects to the second section of the Act of 1903—provided a remedy by bill in equity—a civil suit—against a corporation offending against the provisions of said Act. This

procedure has been recognized and followed in many cases by the Tennessee courts, cited in the opinion in this case on page 519 of the record. That such proceeding was the one to be applied to corporations was the contention of plaintiff in error when it was indicated in what is known in this record as Holt's case (117 Tenn., p. 618), as shown by the opinion in that case, and the brief of its learned counsel, partly incorporated in the record in this case at pages 244-246.

In the Schlitz Brewing Company case, *supra* (104 Tenn.), it was also contended that, before a corporation could be proceeded against by bill in equity there should be an antecedent conviction at law (104 Tenn., pp. 746-751), but the Supreme Court of Tennessee held that such course was not necessary, but that a bill in equity might be filed at once, and in this case the Supreme Court of Tennessee, speaking through Mr. Justice Neil, after reviewing exhaustively (Rec., pp. 510-521) the question of procedure at common law, against corporations violating the law, affirmed the holding of the Schlitz Brewing Co.'s case, and held that section 2 of the Anti-Trust Act of 1903 contemplated and provided a purely civil procedure against a corporation to forfeit its charter or oust it from the State, and that the judgment in such proceeding was a civil judgment according to the practice of courts of equity, and not a criminal sentence. (Rec., p. 520.)

Having thus shown the method of procedure against offending corporations, according to the well established practice of courts of equity, wherein the alleged offender has full opportunity to be heard upon all its defenses in the same and as full a manner as other persons or corporations sued in such courts, *and the right to have any issue of fact submitted to a jury,* we now proceed to notice the grounds upon which plaintiff in error contends that it is deprived of its property by due process of law and denied the equal protection of the law.

The Right of Trial by Jury

One of the reasons set forth by plaintiff in error as a ground for its contention that it is denied the equal protection of the law is that, by the Act of 1903, it is denied the right to a trial by jury.

This proposition wholly ignores both the holding of the Supreme Court and the Statutes of Tennessee.

We have already shown that as a part of the remedy prescribed by the Statutes of Tennessee providing procedure by bill in equity, sometimes referred to in the Tennessee decisions as a proceeding in the nature of a *quo warranto,* the right of a trial by jury of any issue of fact is preserved.

On this point the Supreme Court, in its opinion (Rec., p. 520; 120 Tenn. 137), said:

> "The right of trial by jury, the deprivation of which is complained of in the assignment of error, is preserved under Section 5172 (3416) of the Code."

This section is as follows:

> "Such issues of fact as may become necessary to try by jury in the progress of the cause, will be made up under the direction of the Court, and submitted to a jury impaneled forthwith."
>
> *Code of* 1858, Sec. 3416, S. Sec. 5172.

Immediately following the above statement quoted from the opinion of the Court, Mr. Justice Neil said:

> "It is true that a jury is not permitted in cases of this kind to render a general verdict as in ordinary cases at common law."

And seizing upon this statement, learned counsel for plaintiff in error (Brief, p. 131) insist that the latter statement is "in reality a recantation of the first statement," and then proceeds to insist, in effect, that a trial by jury in the Chancery Court in Tennessee does not determine all of the issues presented by the pleadings, but only such issues as the party calling for the jury sees fit to submit, and that thereupon the Chancellor assuming the facts to be as found by the jury considers them, and such other relevant matters as may not have been submitted, and determine the case for himself.

Brief pp. 131-132.

We submit that the version of a trial by jury, and the effect of a verdict rendered by a jury, as given by the learned counsel for plaintiff in error, is wholly inaccurate.

Formerly a trial by jury in the Chancery Court was a matter of discretion with the Chancellor, but since 1844 either party to a suit in chancery in Ten-

nessee has the right to demand a jury to try and determine any issue of fact involved in a suit.

Allen v. Saulpaw, 6 Lea, 477.

The Code provisions governing trials by jury in the Chancery Court, and to which Section 5172, *supra,* refers, are as follows:

"6282. *Either party may have jury.*—Either party to a suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, and all the issues of fact in any case shall be submitted to one jury.

"6283. *At first term, when.*—If the demand is made in the pleadings, the cause shall be tried at the first term before a jury summoned instanter, in the same way that jury causes are tried at law.

"6284. *When cause is ready for hearing.*—If the demand is only made after the cause is ready for hearing, the trial will be before a jury summoned instanter upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause, as the Court may order.

"6285. *Issues.—The issues shall be made up* by the parties under the direction of the Court, *and set forth briefly and clearly the true questions of fact to be tried.*

"6286. *Trial.—The trial shall be conducted like other jury trials at law, the finding of the*

jury having the same force and effect, and the Court having the same power and control over the finding, as on such trials at law."

Under these provisions it has been repeatedly held by the Supreme Court of Tennessee that a party to a suit in Chancery is entitled to a jury as a matter of right, but the party demanding a jury is bound at his peril to submit proper and material issues determinative of the entire controversy, so that the responses thereto will enable the Chancellor to *settle* the rights of the parties.

Connor v. Frierson, 98 Tenn. 183-188:
James v. Brooks, 6 Heisk. 155-156;
Ragsdale v. Gossett, 2 Lea, 729-739;
Bank v. Oldham, 6 Lea, 728-729.

And if the party avails himself of his right to a jury and submits material issues determinative of the whole case, the force and effect of the verdict is the same as a verdict at law—that is, it is conclusive.

In the case of *State v. Hawkins,* 91 Tenn. 140-144, the Supreme Court of Tennessee, construing the Code provisions above set out governing trials by jury in the Chancery Court, speaking through Mr. Justice Lurton, said:

"This provisions has been construed as requiring that the verdict of a jury on issues of

fact submitted to them in Chancery shall be given the same weight as in a Court of Law, and that until set aside it is equally conclusive."

To the same effect are:

James v. Brooks, 6 Heisk. 155-156;
Morris v. Swaney, 7 Heisk. 593:
Ragsdale v. Gossett, 2 Lea, 739;
Jackson v. Nimmo, 3 Lea, 597-613-614;
Bank v.Oldham, 6 Lea, 728-729.

Therefore, we respectfully submit to your Honors, that the plaintiff in error, having refused to avail itself of its right to a trial by jury in the Chancery Court of Sumner County, where it could have had every issue of fact passed upon and determined by the jury, is now in no position to complain to this Court that it has been denied the equal protection of the law or deprived of its property without due process of law.

Under the laws of Tennessee plaintiff in error was placed upon the same footing, not only with domestic corporations, but with every other person against whom a suit might be brought in the State of Tennessee—it had full opportunity to make every defense, and the same rights and means accorded it to present those defenses and have them determined as is given any other person in Tennessee.

But, we ask:

Is there a semblance of a federal question in the claim to a jury set up by plaintiff in error?

It seems too clear for argument, or the citation of authority, that a federal question is not involved in this claim, made on behalf of plaintiff in error.

Certainly it can claim no right to a trial by jury under any of the first ten amendments to the Federal Constitution, which were not intended to restrict the powers of the State, but to operate solely on the Federal Government.

Brown v. N. J., p. 175, U. S., p. 174;
Barrington v. Missouri, 205 U. S., p. 483;
Spies v. Illinois, 123 U. S., p. 131;
Jack v. Kansas, 199 U. S., 372, 380.

Nor are the "safeguards" of personal rights, which are enumerated in the first eight articles of amendment to the Federal Constitution, sometimes called "the Federal Bill of Rights," among the privileges and immunities of citizens of the United States, within the meaning of the fourteenth amendment to the Federal Constitution.

Twining's case, 211 U. S., p. 78.

The right to a trial by jury is not one of the fundamental rights inherent in national citizenship.

In the case of *Walker v. Sauvinet,* 92 U. S., pp. 90-92, this Court, speaking through Mr. Chief Justice Waite, held that the trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment of the Constitution of the United States to abridge.

In this case Mr. Chief Justice Waite, speaking for this court, among other things, said:

> "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of its property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by a jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken, Co.,* 18 How. 280. *Due process of law is process due according to the law of the State. This process in the States is regulated by the law of the State.*

In *Hurtado v. California,* 110 U. S., p. 516, this Court speaking through Mr. Justice Matthews, reviewed exhaustively the question of juries at common

law—and particularly of grand juries—and held that the fourteenth amendment to the Federal Constitution does not require an indictment or presentment by a grand jury in a prosecution by a State for murder—that a proceeding by information or such other mode as the State might see fit to adopt, wherein the defendant might have a fair and impartial hearing would be "due process of law."

In *Missouri v. Lewis,* 101 U. S., pp. 22, 31, this Court said:

> "The fourteenth amendment to the Federal Constitution does not secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States, seperated only by an imaginary line. On one side of this line there may be a right to trial by a jury, and on the other side no such right. Each State prescribes its own method of judicial procedure."

In *Maxwell v. Dow,* 176 U. S., the decision in *Hurtado v. California, supra,* was reaffirmed, and it was held that the trial of a person accused of a crime tried by a jury of eight persons instead of twelve, as provided by the laws of the State of Utah, and his subsequent imprisonment after conviction by such a jury, did not deprive him of his liberty, without due process of law. In this case, Mr. Justice

Peckham, speaking for the Court, among other things, said:

> The States, so far as this amendment (the fourteenth) is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the fourteenth amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had, according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How., pp. 279-280. Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance there of—or with any treaty made under the authority of the United States.
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> "This case shows that the fourteenth amendment in forbidding a State to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a State court,

> although the right to such trial in the Federal courts is specially secured to all persons in the cases mentioned in the seventh amendment." 176 U. S., 595.

So that, we submit, the contention of plaintiff in error that it has been discriminated against in the matter of a jury trial without color of merit.

This is a civil action to enforce a civil right, and neither denies to the plaintiff in error the equal protection of the law, nor deprives it of its property without due process of law.

It is insisted on behalf of plaintiff in error that it is deprived of due process of law, and denied the equal protection of the law, in that, it was not put to trial under indictment as upon a criminal charge, and that, in this way, it was arbitrarily discriminated against by being denied a trial by jury, and the right to plead the statute of limitations applicable to misdemeanors, under the statutes of Tennessee, and forced to submit to a judgment of ouster upon a preponderance of the testimony, instead of having its guilt established beyond a reasonable doubt—all of which rights— it claims were granted, by Section 3 of said Act, to persons offending against the provisions thereof.

We submit that it is a sufficient answer to this contention on behalf of plaintiff in error to call to the attention of your Honors the holding of the Supreme Court of Tennessee in this case (Rec., p. 520-522) that this proceeding, authorized by section 2 of the Act of 1903, is not a criminal prosecution, but a civil suit by the most appropriate remedy known to the law to enforce a civil right against an offending corporation.

The whole basis of the argument made upon behalf of plaintiff in error is that plaintiff in error in entering into the conspiracy to protect its local business at Gallatin, and free such business from threatened competition, is guilty of misdemeanor under the laws of Tennessee, and therefore can only be prosecuted under an indictment or presentment returned by a grand jury in a Court having criminal jurisdiction.

It is stated and reiterated upon behalf of plaintiff in error that under the provisions of the Code (Shannon), sections 6693, 6694, 6736, a conspiracy in restraint of trade is a misdemeanor, and it is insisted that a misdemeanor is punishable alone in a criminal court under an indictment or presentment, and where a jury trial must be accorded and the weight of evidence established beyond a reasonable doubt.

We have already shown that these Code provisions were repealed and superseded by later statutes intended to protect trade and commerce, and particularly by the Anti-Trust Act of 1903; but even if plaintiff in error were right in its contention, which is denied, that its conspiracy at Gallatin was only a misdemeanor, it by no means follows that it could only be proceeded against by an indictment or presentment, or that it would be entitled to a jury trial or trial according to the usages and practice in criminal courts.

Reference is made in the brief filed on behalf of plaintiff in error to an inaccurate expression (or so copied into the record in this Court) appearing in the brief of counsel for the State in the lower Court to the effect that offenses against the laws of Tennessee can only be proceeded against by presentment or indictment.

Even conceding, for argument only, that plaintiff in error was guilty of a misdemeanor, it by no means follows that under the Constitution and statutes of Tennessee it was entitled either to a trial by jury or to be prosecuted by an indictment or presentment.

As far back as 1848, in the case of *McGinnis v. State,* 9 Hump., 43, it was held by the Supreme Court of Tennessee that the provisions of the State Constitution in relation to preserving inviolate the right of trial by jury (Article 1, section 6), and that no person shall be put to answer any "criminal charge" but by presentment, indictment or impeachment (Section 14), were merely designed to secure the mode of prosecution in cases of felony and of trial by jury as it existed in common law, and that the term "criminal charge" was not intended to and does not comprehend misdemeanors.

In *Hogan v. Chattanooga,* 2 Shan. Cas. 339, it was held by the Supreme Court of Tennessee that:

"Misdemeanors are not within the meaning of the fourteenth clause of the Bill of Rights ordaining that no person shall be put to answer any criminal charge, except by presentment, indictment or impeachment, nor within the clause ordaining that the right of trial by jury shall remain inviolate."

The doctrine of both of these cases was reaffirmed by the Supreme Court of Tennessee as late as 1908 in the case of *State v. Sexton*, 121 Tenn. 35-42-43, sustaining a prosecution instituted before a Justice of the Peace by common warrant or information for a misdemeanor.

Further, it is insisted on behalf of plaintiff in error that under the provisions of the Code (Shannon, Section 6437) to the effect that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor, that plaintiff in error should be prosecuted as for a misdemeanor.

We have just shown that it is not necessary to proceed against a person guilty of a misdemeanor by presentment or indictment, but we call the attention of your Honors to the precise language of the statute making the doing of an act prohibited by statute a misdemeanor where "no penalty for the violation of such statute is imposed."

The first section of the Tennessee Anti-Trust Act makes certain arrangements, combinations and conspiracies unlawful, but it does not stop there—section 2 provides a penalty against corporations violating the provisions of section 1.

It is well settled in Tennessee that where a statute does not make, in express terms, a violation of its provisions a misdemeanor, but provides a penalty or civil remedy against all violators, no criminal action can be predicated upon it.

Murphy v. State, 114 Tenn., 531-533;
State v. Maze, 6 Hump., 17;
State v. Lorry, 7 Baxt., 95;
State v. Manz, 6 Cold., 557.

Further, we respectfully submit to your Honors, that we know of no authority or principal upon which it can be claimed that any defendant in any Court has a fundamental, inherent and inalienable right to be proceeded against in a particular method, or to have the complaint or charge made against him proven beyond a reasonable doubt

We call the attention of your Honors to section 4 of the Tennessee Anti-Trust Act, giving a right of action to any person or corporation injured or damaged by any arrangement, agreement, trust, or combination described in section 1 of said Act, and providing for suits to recover such damages in any Court of competent jurisdiction in Tennessee.

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Could it be claimed on behalf of a person proceeded against under the provisions of section 4 for damages, the result of offending against the provisions of section 1 of said Act, that he was entitled to be prosecuted by an indictment or presentment, or to a jury trial, or to have the amount of the damages to be assessed against him established by evidence beyond a reasonable doubt?

What difference is there in principle between the case supposed and a suit by the State to enforce her remedy against a corporation for violating the provisions of said Act?

The holding of the Supreme Court of Tennessee that this is a civil action to enforce a civil right is not only ~~constructive~~ but is in harmony with the doctrine repeatedly by this Court.

In *Ames v. Kansas,* 111 U. S., 449, one of the questions to be determined was whether a proceeding by the State of Kansas against certain foreign railway corporations to oust them from doing business in that State, was a civil action or criminal prosecution. It appears that in Kansas, as in Tennessee, the writ of *quo warranto* has been abolished, and the remedy sought to be enforced was by bill or petition filed by the State of Kansas, upon the relation of her Attorney General, in the Supreme Court of that State against the corporation sought to be ousted. It thus appears that the remedy sought by Kansas was practically identical with the remedy

sought to be enforced by the State of Tennessee in this case.

In opposition to the right of removal to the Federal Court, sought to be availed of by the foreign corporation, it was objected by the State of Kansas that the suit was not of a civil nature, but were proceedings in *quo warranto,* and therefore in the nature of a criminal prosecution.

In determining this question, this Court, among other things, held:

> "In Kansas the writ of *quo warranto,* and the proceeding by information in the nature of *quo warranto,* have been abolished, and the remedies which were obtainable at common law in those forms are had by civil action.
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> * * * * * * * * *
>
> "The original common law writ of *quo warranto* was a civil writ, at the suit of the Crown, and not a criminal prosecution. *Rex. v. Marsden* 3 Burr., 1817. It was the nature of a writ of right by the King against one who usurped or claimed franchises or liberties to inquire by what right he claimed them (Com. Dig. *Quo Warranto,* A), and the first process was summons. *Id.,* C. 2. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a *quo warranto,* which in its origin was 'a criminal method of prosecution, as well as to punish the usurper by a fine for the usurpation of the

franchise, as to oust him, or seize it for the Crown.' 3 Bl. Com., 263. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor; the fine being nominal only.' 3 Bl. Com., *supra; King v. Francis,* 2 T. R., 484; Bac. Abr., tit. Information, D; 2 Kyd, Corp., 439. And such, without any special legislation to that effect, has always been its character in many of the States of the Union. *Commonw. v. Brown,* 1 Serg. & R. 385; *People v. Richardson,* 4 Cow. 102, n; *State v. Hardie,* 1 Ired 48; *State Bk. v. State, v. Blackf.,* 272; *State v. Lingo,* 26 Mo., 498. * * * *

This being the condition of the old law, it seems to us clear that the effect of legislation like that in Kansas, as to the mode of proceeding in *quo warranto* cases, is to relieve the old civil remedy of the burden of the criminal form of proceeding with which it had become incumbered, and to restore it to its original position as a civil action for the enforcement of a civil right. The right and the remedy are thus brought into harmony, and parties are not driven to the necessity of using the form of a criminal action to determine a civil right. This has been the construction put upon similar laws in other States. *State v. M'Daniel,* 22 Ohio St., 361; *R. R. Co. v. Taylor,* 5 Col., 42; *Bank v. State,* 4 *Sm. & M.,* 490, 504. These suits are, therefore, of a civil nature."

Ames v. Kansas, 111 U. S., 486-487.

The holding in *Ames v. Kansas, supra,* was reaffirmed by this Court in *Foster v. Kansas,* 112 U. S., 205-206, as follows:

> "In *Ames v. Kansas,* it was decided, at the last term, that the remeby by information in the nature of *quo warranto,* in Kansas, was a civil proceeding, and in *Kennard v. La.,* 92 U. S., 480, that a State statute regulating proceedings for the removal of a person from a state office was not repugnant to the Constitution of the United States if it provided for bringing the party against whom the proceeding was had into court, and notifying him of the case he had to meet; for giving him an opportunity to be heard in his defense and for the deliveration and judgment of the Court."

Surely it cannot be claimed by plaintiff in error that it did not have full notice of the charge against it, and ample opportunity to present its defenses.

In *National Cotton Oil Co. v. Texas,* 197 U. S., 133, this Court had under consideration a Texas statute containing provisions identical with those in Section 2 of the Act of 1903, and, among other things, this Court held that the suit was not a criminal prosecution, but, in effect, a civil remedy to enforce the prohibitions of the Texas Anti-Trust Statute.

It is true that under the Texas statute the de-

fendant had a jury trial, or could have had one, but the same right, as has been shown, is accorded to him by the laws of the State of Tennessee.

In *Waters-Pierce Oil Co. v. State* (19 Tex, Civ., App.), affirmed by this Court in *Waters-Pierce Oil Co. v. Tex.*, 177 U. S., 28, it was held that an action to forfeit the permit of a corporation to do business in the State of Texas is a civil controversy, and the charge need not be proven beyond a rasonable doubt.

Further, we respectfully insist that the State of Tennessee, having full power and authority to pass an Act, regulating and controlling intrastate commerce, within her borders, is vested with equal power and authority to provide proceedings to enforce the same, and, keeping within constitutional limitations, may provide its own method of procedure, and determine the methods and means by which such laws may be effectual.

Waters-Pierce Oil Co. v. Texas, 212 U. S., 86, 107, 118.

In *Wilson v. North Carolina,* 169 U. S., 586, it was insisted that the action of the Governor of North Carolina, in suspending a member of the Board of Railroad Commissioners, deprived such

comimssioner of his property rights without due process of law, and denied to him the equal protection of the law, in that, he was not accorded a trial by jury, but was proceeded against summarily, after notice, and removed from his office.

In passing upon these questions, this Court held that the removed commissioner had not been deprived of any right guaranteed to him by the Federal Constitution, and, among other things, said:

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the state legislature to determine, having regard to the constitution of the State. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of a State with reference to its political and internal administration, and a decision of the State Court in regard to its construction and validity will generally be con-

clusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question.

"Upon this subject it was said, in the case of *Allen v. Georgia,* 166 U. S., 138, 140, as follows: 'To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property, without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional laws of a state and its procedure, it could only be in very exceptional circumstances that this Court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.' "

This statement is quoted with approval in *Hovey v. Elliott,* 167 U. S., 40, 443.

"No such fundamental rights were involved in the proceedings before the Governor.

> In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court."

"In *Kennard v. Louisiana,* 92 U. S., 480, the proceeding under which the title to the office of Justice of the Supreme Court of the State was tried, was held not to violate the Fourteenth Amendment of the Constitution of the United States. The Court said the officer had an opportunity to be heard before he was condemned. There was no intimation in that case that a hearing such as was had here would be insufficient or that the officer would be entitled to be 'confronted with his accusers and to cross-examine the witnesses,' and to have a jury trial. In *Foster v. Kansas,* 112 U. S.,201, the *Kennard case* was approved. Neither case gives any suport to the claim that such a hearing as was giv-

en in this case would be insufficient under the Fourteenth Amendment.

> "Nothing in that amendment was intended to secure a jury trial in a case of this nature."
>
> *Wilson v. North Carolina,* 169 U. S., 593, 594.

In *West v. Louisiana,* 194 U. S., pp. 258, 263, this Court, quoting from *Brown v. New Jersey, supra,* among other things, said:

> "The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information.
>
> "The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not

> work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." (194 U. S., p 263.)

In *Leeper v. Texas,* 139 U. S., pp. 462-468, this Court, speaking through Mr. Chief Justice Fuller, said:

> "Law in its regular course of administration through courts of justice is due process; and when secured by the law of the State, the constitutional requirement is satisfied."

In *Iowa Central Railroad Co. v. Iowa,* 160 U. S., pp. 389, 393, this Court, speaking through Mr. Justice White, said:

> "It is clear that the fourteenth amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another."

In *Louisville, etc., Co. v. Schmidt,* 177 U. S., p. 236, this Court, speaking through Mr. Justice White, said:

> "It is no longer open to contention that the due process clause of the fourteenth amendment to the Constitution of the United States does not control mere forms of procedure in State Courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

In *Hooker v. Los Angeles,* 188 U. S., pp. 314-318, this Court said:

> "The fourteenth amendment does not control the power of the State to determine the form of procedure by which legal rights may be obtained, if the method adopted gives reasonable notice and affords fair opportunity to be heard."

In *Rogers v. Peck,* 199 U. S., p. 425, this Court, reviewing the judgment of the Supreme Court of Vermont in a capital case said:

> "Due process of law guaranteed by the fourteenth amendment of the Constitution does

not require a State to adopt any particular form of procedure so long as it appears that the accused has had sufficient notice of the accusation and adequate opportunity to defend himself in the prosecution."

To the same effect are *Rawlins v. Ga.*, 201 U. S., p. 638; *Felts v. Murphy*, 201 U. S., 123, and numerous other cases cited in the opinion of this Court in Twining's case, 211 U. S., p. 78.

In *Hager v. Reclamation District*, 111 U. S., p. 701, this Court, recognizing the impossibility of giving a general definition prescribing what would be, or would not be "due process of law," said in substance, that this phrase meant that the ordinary mode prescribed by law "appropriate to the case and just to the parties affected"—and "adapted to the end to be attained," was due process of law:

And in *Northern Securities Companies v. United States*, U. S., 193, p. 197, 360, this Court, in enforcing the Federal Anti-Trust Act, which also contained provisions for criminal prosecutions, held that the Federal Courts have power, under section 4 of said Federal Anti-Trust Act *by a suit in equity* to prevent and restrain violations of the act and may mould its decree so as to accomplish practical

results, such as law and justice demand. And, in this case, it was in effect held that the proceeding by bill in equity is the only practical remedy to reach the evil sought to be prohibited in such cases.

No unlawful discrimination—only reasonable and natural classification

Now as to the claim of plaintiff in error that it was denied the equal protection of the law, that is, that it was discriminated against by being put to trial under a bill in equity according to the practice of courts of equity and thus denied a trial by jury, or the right of the statute of limitations.

We have already shown that plaintiff in error refused to avail itself of its right to a jury trial by which every issue of fact determinative of the case could have been passed upon by a jury, and we will hereinafter show that no statute of limitations was applicable to the case, whether considered as a civil action or a criminal prosecution; but, aside from these questions, there is no merit in the contention that either the statute or the course of procedure followed thereunder was an unreasonable and capricious discrimination against plaintiff in error.

In *Magoun v. Illinois Trust and Savings Bank*, 179 U. S., p. 283, this Court, in passing upon the

question presented under that clause of the fourteenth amendment, which prohibits the State from denying to any citizen the equal protection of the laws, said:

> "What satisfies this equality has not been, and probably never can, be defined. Generally, it has been said that it 'only requires the same means to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Further the Court said:

> "There is . . . no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. . . . It only requires that the law shall operate on all alike under the same circumstances."

In *Orient Insurance Company v. Daggs,* 172 U. S., p. 557, this Court, citing the case of *Magoun v. Ill. Trust and Banking Co., supra,* said:

> "We said in that case that the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. And this because of the function of legislation and the purposes

> to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable *unless palpably arbitrary.*" (172 U. S., p. 562.)

In *Hager v. Missouri,* 120 U. S., p. 68, this Court held that the statute giving to the State in cities of certain population more challenges than were accorded to a State elsewhere did not deny the equal protection of the law.

In *Missouri v. Lewis,* 101 U. S., 22, approved in *Maxwell v. Dow,* 176 U. S., pp. 598, 599, this Court held that the clause of the fourteenth amendment, which prohibits a State from denying the equal protection of the laws, does not thereby prohibit the State from prescribing the jurisdiction of its several courts either as to their territorial limits or the subject-matter, or the amount or finality of their respective judgments or decrees; that a State might establish one system of law in one portion of its territory and another in another, provided it did not encroach upon the proper jurisdiction of the United States, nor abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protec-

tion of the laws in the same district, nor deprive him of his rights without due process of law.

Can it be contended that the action of the State in providing a remedy against corporations —and it must be borne in mind that the remedy applies both to domestic and foreign corporations —"appropriate to the case" and "adapted to the end to be attained" (*Hager v. Reclamation District, supra*), different from the method of procedure against natural persons was a *palpably arbitrary classification* or discrimination?

We think the answer to this question is to be found in the vital difference between corporations and natural persons. A corporation cannot be imprisoned—the only method of procedure "appropriate to the case"—"adapted to the end to be attaind"—that is, to prohibit it from carrying on its business, is through the injunction process of a court of equity. An injunction issuing out of a criminal court is a thing unknown to the laws.

Responding to the claim made by plaintiff in error that the proceeding deprived it of its property by due process of law and denied to it the equal

protection of the law, the Supreme Count of Tennessee, among other things, said:

> "Now, was it competent for the Legislature to provide a civil remedy against corporations and a criminal remedy against natural persons? Is there any good reason for the discrimination? It seems that there is a good reason in fact that it is impossible to punish such corporations by imprisonment, a kind of punishment which can be inflicted only upon natural persons. Again, the deprivation of business, or charter rights, or the deprivation of the power to exercise business or charter rights within the State through a judgment of ouster, is a legal consequence which cannot be inflicted upon natural persons in the very nature of things, because wholly inapplicable to them. The argument of the defendant is in substance that inasmuch as natural persons may be consigned to the penitentiary under this act by a criminal prosecution, therefore if ousted at all from the State, a corporation should be ousted by the same sort of a prosecution. This seems to us a *non sequitur*. The punishment inflicted upon the corporation is one peculiar to corporations, and is inflictd in the same manner in which this form of correction has been applied to corporations ever since there has been any public redress at all in this State for corporate

wrongs, and is the same, in substance, which has been applied by English-speaking people for a time beyond which the memory of man runneth not to the contrary.

"The defendant insists that it should have been indicted. To what purpose? To suffer in a criminal case a judgment which has for ages been held appropriate only in civil controversies. Has the defendant a right to complain because it was sued in equity instead of indicted in the criminal court? Why should it have been indicted? It could not have been imprisoned, and no fine was authorized against it. If the statute had declared a fine against it, an indictment would have been proper; or if the Act had simply declared unlawful the things it denounced, there might still have been an indictment, as for a misdemeanor; but having declared in terms the illegal consequences of a breach of the legal inhibition, there could be no indictment. But the defendant says the legal consequences of the breach I am to have imposed upon me and am to suffer through the machinery of a court of equity, where I cannot have the benefit of the reasonable doubt or the benefit of the statute of limitations which the sovereign concedes in criminal cases, but does not in its own suits in civil courts, and I am also deprived of the right to a general verdict of

guilty, or not guilty, according to the course of practice in criminal courts. But suppose we turn the case about, and consider what a natural person might say. He complains: I am subjected to the humiliation of an indictment for a felony, and if convicted I may be sent to the penitentiary for a term of years, while a corporation that does the same thing is subjected merely to the loss of a civil power, the right to do business; while I am subjected to the humiliation of the criminal court, a corporation for the same act enjoys the benign principles that are administered in a court of equity. Is not the case of the natural person as strong in the matter of discrimination as that of the corporation? What then? Is it true that for the same breach of duty a corporation and a citizen must both be indicted? Although, owing to the different features of the natural person the same punishment cannot be inflicted. Although it is impossible to reach the same end as to both by the same means? Although as to the natural person it may result in imprisonment in the penitentiary for ten years, and as to the corporation only a fine or money judgment? Would there be no inequality in that result? But will it be said that the Legislature might have authorized an indictment and annexed as punishment the forfeiture of corporate franchises in case of domestic corporations? If so, there

would have been converted into a criminal sentence a judgment which has been, from time immemorial, held to be but a civil determination. Shall all these hoary precedents be overturned to attain a state of harmony with an abstract theory? The true theory is that corporations and natural persons are so diverse in some respects that there is no basis or common ground of comparison, but a necessity of simple antithesis. And such is the particular aspect in which they are presented in the present litigation." (Record, pp. 522, 523.)

No Statute of Limitations applicable whether the case against Plaintiff in Error be a Civil Action or a Criminal Prosecution.

As a complete answer to the contention made on behalf of plaintiff in error that, by the trial under a bill in equity in the Chancery Court, it was deprived of its right to plead the statute of limitations applicable to misdemeanors. We submit:

First.—This is a civil action, and under the Code of Tennessee (Shannon's Code, Section 4453), as held by the Supreme Court of Tennessee (Rec., p. 523), no statute of limitations is applicable thereto as against the State.

Chapter 2 of Part 3 of the Code of Tennessee relates to limitations of actions, and embodied in Chapter 2 is Section 4453, referred to by the Supreme Court of Tennessee, as follows: "The provisions of this chapter do not apply to actions brought either by or against the State of Tennessee, unless otherwise expressly provided."

The holding of the Supreme Court of Tennssee in this case is in harmony with prior adjudications of that Court to the effect that the several statutes of limitations—including the one relating to statutory penalties—embraced within said

Chapter 2, do not apply to actions brought by the State.

O'Neil's Sureties v. State, 10 Lea, 727, 728, 729.

Second.—The Supreme Court of Tennessee held (Rec., pp. 523-524) that the offense against the laws of trade, punished by Section 3 of the Act of 1903, is a felony of such grade that no statute of limitations applies thereto.

Rafferty v. State, 91 Tenn., 655-657-658.

The holding by the Supreme Court of Tennessee that an offense *liable to be punished* by imprisonment in the penitentiary (as is the case under Section 3 of the Act of 1903) is a felony, is not only conclusive, but is sustained by the weight of authority.

State v. McCormick, 44 Me., 566;
Benton v. Com., 89 Va., 570;
In Re Stephens, 52 Kan., 56;
State v. Clayton, 100 Mo., 516:

Third.—The Supreme Court of Tennessee expressly held (Rec., pp. 523-524) that neither the statute of limitations (Shannon's Code, Sections 6942-6945), nor the case of *Turley v. State,* 3 Heiskell, 11, relied upon by plaintiff in error, either controls or ~~have~~ has any application to this case.

Fourth.—It is well settled that the construction, application and effect given by the Supreme Court of State to a statute of limitations enacted by a State Legislature is not subject to re-examination by this Court under a writ of error to the State Court.

Harrison v. Myer, 92 U. S., 111;
McStacy v. Friedman, 92 U. S., 723.

Conclusion.

The plainitff in error attacks, in this record, the policy of the Tennessee Anti-Trust Act. Naturally, having enjoyed and abused the courtesy and hospitality of the State, plaintiff in error questions the propriety of excluding it, thereby denying to it further opportunity to use and abuse that hospitality for its own pecuniary ends. However, with the policy of legislation Courts have nothing to do.

There is no doubt but that the tremendous powers of plaintiff in error, as shown in this record, may be used as agencies for good, but, as demonstrated, such powers are oftentimes used as instruments for evil to others—to those whom it should serve with just and fair trade.

Plaintiff in error has seen fit to criticize as frivolous (Rec., pp. 430-431) this attempt to enforce the law of the State of Tennessee in pursuance of its declared policy that trade within the State shall be unrestricted, and competition in such trade full and fair. But the acts and doings of plaintiff in error, resulting in a monopoly in the oil business in Tennessee, and the sale of a commodity of prime necessity, at such price as it may arbitra-

rily fix, is by no means a frivolous matter to the people of Tennessee.

It is urged on behalf of plaintiff in error that this record discloses only one violation by it of the Tennessee Anti-Trust Act, even if its acts and doings at Gallatin are in contravention of that Act.

Is it meant by this that a law should not be enforced for one violation? How often, it may be asked, must a statute be broken before the punishment provided by it shall be visited upon the offender?

But, we submit to your Honors, that while this record deals with the business of the plaintiff in error at only three places—at Gallatin, Dover and Nashville—yet in each and all of these places the record does show that plaintiff in error, whenever it had the opportunity, did not hesitate to stifle competition, or, by means denounced by the statute, to drive a competitor out of the market.

The record shows that plaintiff in error is ready to use such means as the occasion may require. Petty and sordid means were sufficient to crush out competition at Gallatin. But, when

competition open, honest and fair, stood in the way of its absolute control of the Nashville market, it did not hesitate to use its tremendous powers to either drive out of business one of its competitors, and to make of the other its creature, continuing to hold it out as an independent competitor, and thereby more effectually serving its purposes and interests.

We respectfully, but earnestly, submit to your Honors that this record clearly shows a violation by plaintiff in error of the Tennessee statute enacted to foster full and fair competition in trade and business in that State—that plaintiff in error has had its day in Court, and an opportunity to avail itself of all defenses, according to long recognized and approved methods of procedure, applicable not only to foreign corporations, but to every corporation created by the laws of the State of Tennessee.

That plaintiff in error has violated the laws of the State of Tennessee is demonstrated upon this record, and she now asks that the penalty for the breach of her hospitality and the violation of her laws be enforced.

Respectfully submitted,

CHARLES T. CATES, Jr.,

Attorney-General.

APPENDIX A.

Acts of 1903, Chapter 140.

An Act to declare unlawful and void all arrangements and contracts, agreements, trusts, or combinations made with a view to lessen or which tend to lessen free competition in the importation or sale of articles imported into this State; or in the manufacture or sale of articles of domestic growth or of raw material; to declare unlawful and void all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price of such product or article to producer or consumer of any such product or article; to provide for forfeiture of the charter and franchise of any corporation, organized under the laws of this State, violating any of the provisions of this Act; to prohibit every foreign corporation violating any of the provisions of this Act from doing business in this State; to require the Attorney-General of this State to institute legal proceedings against any such corporations violating the provisions of this Act, and to enforce the penalties prescribed; to prescribe penalties for any violation of this Act; to authorize any person or corporation damaged by any such trust, agreement or combination to sue for the recovery of such damages, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same, That from and after the passage of this Act all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control

the price or the cost to the producer or the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void.

Section 2. Be it further enacted, That any corporation chartered under the laws of the State which shall violate any of the provisions of this Act shall thereby forfeit its charter and its franchise and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this Act is hereby denied the right to do, and is prohibited from doing business in this State. It is hereby made the duty of the Attorney-General of this State to enforce these provisions by due process of law.

Section 3. Be it further enacted, That any violation of the provisions of this Act shall be deemed, and is hereby declared to be destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy or who shall, as principal manager, director or agent, or in any other capacity, knowinly carry out any of the stipulations, purposes, prices, rates or orders made in furtherance of such conspiracy, shall upon conviction be punished by a fine of not less than one hundred dollars or more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years; or in the judgment of the Court, by etiher such fine or imprisonment.

Section 4. Be it further enacted, That any person or persons or corporation that may be injured or damaged by any such arrangement, contract, agreement, trust or combination, described in Section 1 of this Act may sue for and recover in any court of competent jurisdiction in this State, of any person or persons, or corporations operating such trusts or combination, the full consideration or sum paid by him or them of any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust.

Section 5. Be it further enacted, That it shall be the duty of the Judge of the Circuit and Criminal Courts of this State specially to instruct grand juries as to the provisions of this Act.

Section 6. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Section 7. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 16, 1903.

L. D. Tyson,
Speaker of the House of Representatives.

Ed T. Seay,
Speaker of the Senate.

Approved March 23, 1903.

James B. Frazier,
Governor.

APPENDIX B.

Acts of 1891, Chapter 122.

An Act to amend Chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real and personal property in this State, so as to make the provisions of said Act apply to all foreign corporations that may desire to own property or to do business in this State.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That Chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said Act shall apply to all corporations chartered or organized under the laws of other States or counties for any purpose whatsoever which may desire to do any kind of business in this State.

Section 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own property or carry on business in this State of any kind or character, shall first file in the office of the Secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the Register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by Section 2 of Chapter 31 of Acts of 1877.

Section 3. Be it further enacted, That it shall be

unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this Act, and a violation of this statute shall subject the offender to a fine of not less than $100.00 nor more than $500.00, at the discretion of the jury trying the case.

Section 4. Be it further enacted, That when a corporation complies with the provisions of this Act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

Section 5. Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment, he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this Act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

Section 6. Be it further enacted, That said Chap-

ter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this Act, and the same is declared to be in full force.

Section 7. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 21, 1891.

THOMAS R. MYERS,
Speaker of the House of Representatives.

W. C. DISMUKES,
Speaker of the Senate.

Approved March 26, 1891.

JOHN P. BUCHANAN,
Governor.

APPENDIX C.

Acts of 1889, Chapter 250.

An Act to prevent conspiracies and formations of trusts against legitimate trade and commerce, and to suppress illegal combinations against the same.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall not be lawful for any person or persons, or associations of persons or any incorporation in this State, *or doing business in this State,* to form, or agree to, or to conspire to form any trust, pool, or corner or combination, or any other arrangement or device, in or about any article of legitimate traffic, the production or manufacture or sale of such article that may injuriously affect, and for the purpose of injuriously affecting the legitimate trade and commerce of the county, or to limit the supply or production of said articles, whereby the price of such produce or manufactured articles, or other articles of legitimate trade may be unduly depressed and put down, or unduly raised or increased, for the purpose of speculation, either by pooling or purchasing said articles for the purpose of withdrawing them from market to destroy legitimate competition, or to create a monopoly or corner in the same, or to produce an undue demand for the same, and that to unduly raise the price of said articles, or by throwing the same on the market when so accumulated or purchased for the purpose of creating an undue depres-

sion in the price of such article, and by such means to destroy or limit legitimate competition in the production, manufacture or sale of such articles, as by any other device or arrangement for such purpose. All such agreements, trusts, pools, corners and combinations are hereby prohibited; provided nothing herein contained shall be construed to prevent or interfere with parties engaged in legitimate trade and speculation.

Section 2. Be it further enacted, That any person or persons or *corporation* violating the first section of this Act, for the first offense, shall, on conviction, pay a fine of not less than two hundred and fifty dollars, and for the second offense a fine of not less than five hundred dollars, and the Attorney-General, for each conviction, shall have a taxed fee of fifty dollars, and shall have, in addition, fifty per cent of the money actually received on such fines, and he shall prosecute all such cases, ex officio, without any other prosecutor, and the Courts shall give this Act in charge and the grand jury shall have full inquisitorial power in such cases.

Section 3. Be it further enacted, That no contract made by any person or persons or incorporations, whereby to carry out, or agree to carry out, any of the agreements or combinations enumerated in and prohibited in the foregoing act, shall be enforced in any of the courts of this State whether the

same be made by citizens of this State or any other State.

Section 4. Be it further enacted, That any corporation created or incorporated by or under the laws of this State, which violates any provisions of this Act, shall thereby forfeit its corporate rights and franchises, and its corporate existence shall thereupon cease and determine, and it shall be the duty of the Attorney-General of the State, of their own motion and without leave of order of any court or judge, to institute an action in behalf of the people and in the name of the State for the forfeiture of such rights and franchises, and the dissolution of such corporate existence, or any citizen of the State may institute such suit by proceedings in a Court of Chancery in the name of the State, and said corporations may be enjoined from violation of this Act, pending such proceedings, provided such citizen may not begin such proceedings without giving security for cost in such cases.

Passed April 4, 1889.

W. L. CLAPP,
Speaker of the House of Representatives.
BENJ. J. LEA,
Speaker of the Senate.

Approved April 6, 1889.

ROBERT L. TAYLOR,
Governor.